

§ 36.607

pursuant to the Act's revised standards, and, to the extent possible, priority will be afforded the request in the review process.

[Order No. 1513-91, 56 FR 35592, July 26, 1991, redesignated and amended by AG Order No. 3181-2010, 75 FR 56258, Sept. 15, 2010]

§ 36.607 Guidance concerning model codes.

Upon application by an authorized representative of a private entity responsible for developing a model code, the Assistant Attorney General may review the relevant model code and issue guidance concerning whether and in what respects the model code is consistent with the minimum requirements of the Act for the accessibility and usability of places of public accommodation and commercial facilities under this part.

[Order No. 1513-91, 56 FR 35592, July 26, 1991, redesignated by AG Order No. 3181-2010, 75 FR 56258, Sept. 15, 2010]

APPENDIX A TO PART 36—GUIDANCE ON REVISIONS TO ADA REGULATION ON NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

NOTE: This Appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR part 36 published on September 15, 2010.

SECTION-BY-SECTION ANALYSIS AND RESPONSE TO PUBLIC COMMENTS

This section provides a detailed description of the Department's changes to the title III regulation, the reasoning behind those changes, and responses to public comments received on these topics. The Section-by-Section Analysis follows the order of the title III regulation itself, except that if the Department has not changed a regulatory section, the unchanged section has not been mentioned.

SUBPART A—GENERAL

SECTION 36.104 DEFINITIONS

“1991 Standards” and “2004 ADAAG”

The Department has included in the final rule new definitions of both the “1991 Standards” and the “2004 ADAAG.” The term “1991 Standards” refers to the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36. The term “2004 ADAAG” refers to ADA Chapter 1, ADA Chapter 2, and

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Chapters 3 through 10 of the Americans with Disabilities Act and the Architectural Barriers Act Accessibility Guidelines, which were issued by the Access Board on July 23, 2004, codified at 36 CFR 1191, app. B and D (2009), and which the Department has adopted in this final rule. These terms are included in the definitions section for ease of reference.

“2010 Standards”

The Department has added to the final rule a definition of the term “2010 Standards.” The term “2010 Standards” refers to the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36.

“Direct Threat”

The final rule moves the definition of direct threat from § 36.208(b) to the definitions section at § 36.104. This is an editorial change. Consequently, § 36.208(c) becomes § 36.208(b) in the final rule.

“Existing Facility”

The 1991 title III regulation provided definitions for “new construction” at § 36.401(a) and “alterations” at § 36.402(b). In contrast, the term “existing facility” was not explicitly defined, although it is used in the statute and regulations for titles II and III. *See, e.g.*, 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150. It has been the Department's view that newly constructed or altered facilities are also existing facilities subject to title III's continuing barrier removal obligation, and that view is made explicit in this rule.

The classification of facilities under the ADA is neither static nor mutually exclusive. Newly constructed or altered facilities are also existing facilities. A newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction, with respect to those elements for which, at that time, there were applicable ADA Standards. That same facility, however, after construction, is *also* an existing facility, and subject to the public accommodation's continuing obligation to remove barriers where it is readily achievable to do so. The fact that the facility is also an existing facility does not relieve the public accommodation of its obligations under the new construction requirements of this part. Rather, it means that in addition to the new construction requirements, the public accommodation has a continuing obligation to remove barriers that arise, or are deemed barriers, only after construction. Such barriers include but are not limited to the elements that are first covered in the 2010 Standards, as that term is defined in § 36.104.

At some point, the same facility may undergo alterations, which are subject to the alterations requirements in effect at that time. This facility remains subject to its original new construction standards for elements and spaces not affected by the alterations; the facility is subject to the alterations requirements and standards in effect at the time of the alteration for the elements and spaces affected by the alteration; and, throughout, the facility remains subject to the continuing barrier removal obligation.

The Department's enforcement of the ADA is premised on a broad understanding of "existing facility." The ADA contemplates that as the Department's knowledge and understanding of accessibility advances and evolves, this knowledge will be incorporated into and result in increased accessibility in the built environment. Title III's barrier removal provisions strike the appropriate balance between ensuring that accessibility advances are reflected in the built environment and mitigating the costs of those advances to public accommodations. With adoption of the final rule, public accommodations engaged in barrier removal measures will now be guided by the 2010 Standards, defined in § 36.104, and the safe harbor in § 36.304(d)(2).

The NPRM included the following proposed definition of "existing facility": "[A] facility that has been constructed and remains in existence on any given date." 73 FR 34508, 34552 (June 17, 2008). While the Department intended the proposed definition to provide clarity with respect to public accommodations' continuing obligation to remove barriers where it is readily achievable to do so, some commenters pointed out arguable ambiguity in the language and the potential for misapplication of the rule in practice.

The Department received a number of comments on this issue. The commenters urged the Department to clarify that all buildings remain subject to the standards in effect at the time of their construction, that is, that a facility designed and constructed for first occupancy between January 26, 1993, and the effective date of the final rule is still considered "new construction" and that alterations occurring between January 26, 1993, and the effective date of the final rule are still considered "alterations."

The final rule includes clarifying language to ensure that the Department's interpretation is accurately reflected. As established by this rule, existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part. Thus, this definition reflects the Department's longstanding interpretation that public accommodations have obligations in existing facilities that are independent of but may coexist with requirements imposed by new construction or alteration requirements in those same facilities.

"Housing at a Place of Education"

The Department has added a new definition to § 36.104, "housing at a place of education," to clarify the types of educational housing programs that are covered by this title. This section defines "housing at a place of education" as "housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence." This definition does not apply to social service programs that combine residential housing with social services, such as a residential job training program.

"Other Power-Driven Mobility Device" and "Wheelchair"

Because relatively few individuals with disabilities were using nontraditional mobility devices in 1991, there was no pressing need for the 1991 title III regulation to define the terms "wheelchair" or "other power-driven mobility device," to expound on what would constitute a reasonable modification in policies, practices, or procedures under § 36.302, or to set forth within that section specific requirements for the accommodation of mobility devices. Since the issuance of the 1991 title III regulation, however, the choices of mobility devices available to individuals with disabilities have increased dramatically. The Department has received complaints about and has become aware of situations where individuals with mobility disabilities have utilized devices that are not designed primarily for use by an individual with a mobility disability, including the Segway® Personal Transporter (Segway® PT), golf cars, all-terrain vehicles (ATVs), and other locomotion devices.

The Department also has received questions from public accommodations and individuals with mobility disabilities concerning which mobility devices must be accommodated and under what circumstances. Indeed, there has been litigation concerning the legal obligations of covered entities to accommodate individuals with mobility disabilities who wish to use an electronic personal assistance mobility device (EPAMD), such as the Segway® PT, as a mobility device. The Department has participated in such litigation as amicus curiae. See *Ault v. Walt Disney World Co.*, No. 6:07-cv-1785-Orl-31KRS, 2009 WL 3242028 (M.D. Fla. Oct. 6, 2009). Much of the litigation has involved shopping malls where businesses have refused to allow persons with disabilities to use EPAMDs. See, e.g., *McElroy v. Simon Property Group*, No. 08-404 RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining mall from prohibiting the use of a Segway® PT as a mobility device where an individual agrees to all of a mall's policies for use of the device, except indemnification); *Shasta*

Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674> (last visited June 24, 2010).

In response to questions and complaints from individuals with disabilities and covered entities concerning which mobility devices must be accommodated and under what circumstances, the Department began developing a framework to address the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. As a result, the Department's NPRM proposed two new approaches to mobility devices. First, the Department proposed a two-tiered mobility device definition that defined the term "wheelchair" separately from "other power-driven mobility device." Second, the Department proposed requirements to allow the use of devices in each definitional category. In §36.311(a), the NPRM proposed that wheelchairs and manually-powered mobility aids used by individuals with mobility disabilities shall be permitted in any areas open to pedestrian use. Section 36.311(b) of the NPRM proposed that a public accommodation "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations." 73 FR 34508, 34556 (June 17, 2008).

The Department sought public comment with regard to whether these steps would, in fact, achieve clarity on these issues. Toward this end, the Department's NPRM asked several questions relating to the definitions of "wheelchair," "other power-driven mobility device," and "manually-powered mobility aids"; the best way to categorize different classes of mobility devices, the types of devices that should be included in each category; and the circumstances under which certain types of mobility devices must be accommodated or may be excluded pursuant to the policy adopted by the public accommodation.

Because the questions in the NPRM that concerned mobility devices and their accommodation were interrelated, many of the commenters' responses did not identify the specific question to which they were responding. Instead, commenters grouped the questions together and provided comments accordingly. Most commenters spoke to the issues addressed in the Department's questions in broad terms and using general concepts. As a result, the responses to the questions posed are discussed below in broadly

grouped issue categories rather than on a question-by-question basis.

Two-tiered definitional approach. Commenters supported the Department's proposal to use a two-tiered definition of mobility device. Commenters nearly universally said that wheelchairs always should be accommodated and that they should never be subject to an assessment with regard to their admission to a particular public accommodation. In contrast, the vast majority of commenters indicated they were in favor of allowing public accommodations to conduct an assessment as to whether, and under which circumstances, other power-driven mobility devices will be allowed on-site.

Many commenters also indicated their support for the two-tiered approach in responding to questions concerning the definition of "wheelchair" and "other power-driven mobility device." Nearly every disability advocacy group said that the Department's two-tiered approach strikes the proper balance between ensuring access for individuals with disabilities and addressing fundamental alteration and safety concerns held by public accommodations; however, a minority of disability advocacy groups wanted other power-driven mobility devices to be included in the definition of "wheelchair." Most advocacy, nonprofit, and individual commenters supported the concept of a separate definition for "other power-driven mobility device" because a separate definition would maintain existing legal protections for wheelchairs while recognizing that some devices that are not designed primarily for individuals with mobility disabilities have beneficial uses for individuals with mobility disabilities. They also favored this concept because it recognizes technological developments and that innovative uses of varying devices may provide increased access to individuals with mobility disabilities.

While two business associations indicated that they opposed the concept of "other power-driven mobility device" in its entirety, other business commenters expressed general and industry-specific concerns about permitting their use. They indicated that such devices create a host of safety, cost, and fraud issues that do not exist with wheelchairs. On balance, however, business commenters indicated that they support the establishment of a two-tiered regulatory approach because defining "other power-driven mobility device" separately from "wheelchair" means that businesses will be able to maintain some measure of control over the admission of the former. Virtually all of these commenters indicated that their support for the dual approach and the concept of other power-driven mobility devices was, in large measure, due to the other power-driven mobility device assessment factors in §36.311(c) of the NPRM.

By maintaining the two-tiered approach to mobility devices and defining “wheelchair” separately from “other power-driven mobility device,” the Department is able to preserve the protection users of traditional wheelchairs and other manually-powered mobility aids have had since the ADA was enacted, while also recognizing that human ingenuity, personal choice, and new technologies have led to the use of devices that may be more beneficial for individuals with certain mobility disabilities.

Moreover, the Department believes the two-tiered approach gives public accommodations guidance to follow in assessing whether reasonable modifications can be made to permit the use of other power-driven mobility devices on-site and to aid in the development of policies describing the circumstances under which persons with disabilities may use such devices. The two-tiered approach neither mandates that all other power-driven mobility devices be accommodated in every circumstance, nor excludes these devices from all protection. This approach, in conjunction with the factor assessment provisions in §36.311(b)(2), will serve as a mechanism by which public accommodations can evaluate their ability to accommodate other power-driven mobility devices. As will be discussed in more detail below, the assessment factors in §36.311(b)(2) are specifically designed to provide guidance to public accommodations regarding whether it is permissible to bar the use of a specific other power-driven mobility device in a specific facility. In making such a determination, a public accommodation must consider the device’s type, size, weight dimensions, and speed; the facility’s volume of pedestrian traffic; the facility’s design and operational characteristics; whether the device conflicts with legitimate safety requirements; and whether the device poses a substantial risk of serious harm to the immediate environment or natural or cultural resources, or conflicts with Federal land management laws or regulations. In addition, under §36.311(b)(i) if the public accommodation claims that it cannot make reasonable modifications to its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with disabilities, the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public accommodation.

Categorization of wheelchair versus other power-driven mobility devices. Implicit in the creation of the two-tiered mobility device concept is the question of how to categorize which devices are wheelchairs and which are other power-driven mobility devices. Finding weight and size to be too restrictive, the vast majority of advocacy, nonprofit, and individual commenters opposed using the De-

partment of Transportation’s definition of “common wheelchair” to designate the mobility device’s appropriate category. Business commenters who generally supported using weight and size as the method of categorization did so because of their concerns about having to make physical changes to their facilities to accommodate oversized devices. The vast majority of business commenters also favored using the device’s intended use to categorize which devices constitute wheelchairs and which are other power-driven mobility devices. Furthermore, the intended-use determinant received a fair amount of support from advocacy, nonprofit, and individual commenters, either because they sought to preserve the broad accommodation of wheelchairs or because they sympathized with concerns about individuals without mobility disabilities fraudulently bringing other power-driven mobility devices into places of public accommodation.

Commenters seeking to have the Segway® PT included in the definition of “wheelchair” objected to classifying mobility devices on the basis of their intended use because they felt that such a classification would be unfair and prejudicial to Segway® PT users and would stifle personal choice, creativity, and innovation. Other advocacy and nonprofit commenters objected to employing an intended-use approach because of concerns that the focus would shift to an assessment of the device, rather than the needs or benefits to the individual with the mobility disability. They were of the view that the mobility-device classification should be based on its function—whether it is used to address a mobility disability. A few commenters raised the concern that an intended-use approach might embolden public accommodations to assess whether an individual with a mobility disability really needs to use the other power-driven mobility device at issue or to question why a wheelchair would not provide sufficient mobility. Those citing objections to the intended-use determinant indicated it would be more appropriate to make the categorization determination based on whether the device is being used for a mobility disability in the context of the impact of its use in a specific environment. Some of these commenters preferred this approach because it would allow the Segway® PT to be included in the definition of “wheelchair.”

Some commenters were inclined to categorize mobility devices by the way in which they are powered, such as battery-powered engines versus fuel or combustion engines. One commenter suggested using exhaust level as the determinant. Although there were only a few commenters who would make the determination based on indoor or outdoor use, there was nearly universal support for banning from indoor use devices

that are powered by fuel or combustion engines.

A few commenters thought it would be appropriate to categorize the devices based on their maximum speed. Others objected to this approach, stating that circumstances should dictate the appropriate speed at which mobility devices should be operated—for example, a faster speed may be safer when crossing streets than it would be for sidewalk use—and merely because a device can go a certain speed does not mean it will be operated at that speed.

The Department has decided to maintain the device's intended use as the appropriate determinant for which devices are categorized as “wheelchairs.” However, because wheelchairs may be intended for use by individuals who have temporary conditions affecting mobility, the Department has decided that it is more appropriate to use the phrase “primarily designed” rather than “solely designed” in making such categorizations. The Department will not foreclose any future technological developments by identifying or banning specific devices or setting restrictions on size, weight, or dimensions. Moreover, devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component. Consequently, rarely, if ever, is any inquiry or assessment as to their appropriateness for use in a public accommodation necessary.

Definition of “wheelchair.” In seeking public feedback on the NPRM's definition of “wheelchair,” the Department explained its concern that the definition of “wheelchair” in section 508(c)(2) of the ADA (formerly section 507(c)(2), July 26, 1990, 104 Stat. 372, 42 U.S.C. 12207, renumbered section 508(c)(2), Public Law 110-325 section 6(a)(2), Sept. 25, 2008, 122 Stat. 3558), which pertains to Federal wilderness areas, is not specific enough to provide clear guidance in the array of settings covered by title III and that the stringent size and weight requirements for the Department of Transportation's definition of “common wheelchair” are not a good fit in the context of most public accommodations. The Department noted in the NPRM that it sought a definition of “wheelchair” that would include manually-operated and power-driven wheelchairs and mobility scooters (i.e., those that typically are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas), as well as a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. The NPRM de-

fined a wheelchair as “a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually-operated or power-driven.” 73 FR 34508, 34553 (June 17, 2008). Although the NPRM's definition of “wheelchair” excluded mobility devices that are not designed solely for use by individuals with mobility disabilities, the Department, noting that the use of the Segway® PT by individuals with mobility disabilities is on the upswing, inquired as to whether this device should be included in the definition of “wheelchair.”

Most business commenters wished the definition of “wheelchair” had included size, weight, and dimension maximums. Ultimately, however, they supported the definition because it excludes other power-driven mobility devices and enables them to engage in an assessment to determine whether a particular device can be allowed as a reasonable modification. These commenters felt this approach gave them some measure of control over whether, and under what circumstances, other power-driven mobility devices may be used in their facilities by individuals with mobility disabilities. Two commenters noted that because many mobility scooters are oversized, they are misplaced in the definition of “wheelchair” and belong with other power-driven mobility devices. Another commenter suggested using maximum size and weight requirements to allocate which mobility scooters should be categorized as wheelchairs, and which should be categorized as other power-driven mobility devices.

Many advocacy, nonprofit, and individual commenters indicated that as long as the Department intends the scope of the term “mobility impairments” to include other disabilities that cause mobility impairments (e.g., respiratory, circulatory, stamina, etc.), they were in support of the language. Several commenters indicated a preference for the definition of “wheelchair” in section 508(c)(2) of the ADA. One commenter indicated a preference for the term “assistive device,” as it is defined in the Rehabilitation Act of 1973, over the term “wheelchair.” A few commenters indicated that strollers should be added to the preamble's list of examples of wheelchairs because parents of children with disabilities frequently use strollers as mobility devices until their children get older.

In the final rule, the Department has rearranged some wording and has made some changes in the terminology used in the definition of “wheelchair,” but essentially has retained the definition, and therefore the rationale, that was set forth in the NPRM. Again, the text of the ADA makes the definition of “wheelchair” contained in section

508(c)(2) applicable only to the specific context of uses in designated wilderness areas, and therefore does not compel the use of that definition for any other purpose. Moreover, the Department maintains that limiting the definition to devices suitable for use in an “indoor pedestrian area” as provided for in section 508(c)(2) of the ADA would ignore the technological advances in wheelchair design that have occurred since the ADA went into effect and that the inclusion of the phrase “indoor pedestrian area” in the definition of “wheelchair” would set back progress made by individuals with mobility disabilities who, for many years now, have been using devices designed for locomotion in indoor and outdoor settings. The Department has concluded that same rationale applies to placing limits on the size, weight, and dimensions of wheelchairs.

With regard to the term “mobility impairments,” the Department intended a broad reading so that a wide range of disabilities, including circulatory and respiratory disabilities, that make walking difficult or impossible, would be included. In response to comments on this issue, the Department has revisited the issue and has concluded that the most apt term to achieve this intent is “mobility disability.”

In addition, the Department has decided that it is more appropriate to use the phrase, “primarily” designed for use by individuals with disabilities in the final rule, rather than, “solely” designed for use by individuals with disabilities—the phrase, proposed in the NPRM. The Department believes that this phrase more accurately covers the range of devices the Department intends to fall within the definition of “wheelchair.”

After receiving comments that the word “typical” is vague and the phrase “pedestrian areas” is confusing to apply, particularly in the context of similar, but not identical, terms used in the proposed Standards, the Department decided to delete the term “typical indoor and outdoor pedestrian areas” from the final rule. Instead, the final rule references “indoor or * * * both indoor and outdoor locomotion,” to make clear that the devices that fall within the definition of “wheelchair” are those that are used for locomotion on indoor and outdoor pedestrian paths or routes and not those that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes. Thus, the final rule defines the term “wheelchair” to mean “a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion.”

Whether the definition of “wheelchair” includes the Segway® PT. As discussed above, because individuals with mobility disabilities are using the Segway® PT as a mobility device, the Department asked whether it

should be included in the definition of “wheelchair.” The basic Segway® PT model is a two-wheeled, gyroscopically-stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. Most Segway® PTs can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed for power-operated wheelchairs of 6 miles per hour. In a study of trail and other non-motorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of individuals using EPAMDs ranged from approximately 69 to 80 inches. See Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 14, 2004), available at <http://www.fhrc.gov/safety/pubs/04103> (last visited June 24, 2010). Thus, the Segway® PT can operate at much greater speeds than wheelchairs, and the average user stands much taller than most wheelchair users.

The Segway® PT has been the subject of debate among users, pedestrians, disability advocates, State and local governments, businesses, and bicyclists. The fact that the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of to what extent individuals with disabilities should be allowed to operate them in areas and facilities where other power-driven mobility devices are not allowed. Those who question the use of the Segway® PT in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users.

Comments regarding whether to include the Segway® PT in the definition of “wheelchair” were, by far, the most numerous received in the category of comments regarding wheelchairs and other power-driven mobility devices. Significant numbers of veterans with disabilities, individuals with multiple sclerosis, and those advocating on their behalf made concise statements of general support for the inclusion of the Segway® PT in the definition of “wheelchair.” Two veterans offered extensive comments on the topic, along with a few advocacy and non-profit groups and individuals with disabilities for whom sitting is uncomfortable or impossible.

While there may be legitimate safety issues for EPAMD users and bystanders in some circumstances, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. Among the reasons given by commenters to include the Segway® PT in the definition of “wheelchair” were that the Segway® PT is

well-suited for individuals with particular conditions that affect mobility including multiple sclerosis, Parkinson's disease, chronic obstructive pulmonary disease, amputations, spinal cord injuries, and other neurological disabilities, as well as functional limitations, such as gait limitation, inability to sit or discomfort in sitting, and diminished stamina issues. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004. Commenters specifically cited pressure relief, reduced spasticity, increased stamina, and improved respiratory, neurologic, and muscular health as secondary medical benefits from being able to stand.

Other arguments for including the Segway® PT in the definition of "wheelchair" were based on commenters' views that the Segway® PT offers benefits not provided by wheelchairs and mobility scooters, including its intuitive response to body movement, ability to operate with less coordination and dexterity than is required for many wheelchairs and mobility scooters, and smaller footprint and turning radius as compared to most wheelchairs and mobility scooters. Several commenters mentioned improved visibility, either due to the Segway® PT's raised platform or simply by virtue of being in a standing position. And finally, some commenters advocated for the inclusion of the Segway® PT simply based on civil rights arguments and the empowerment and self-esteem obtained from having the power to select the mobility device of choice.

Many commenters, regardless of their position on whether to include the Segway® PT in the definition of "wheelchair," noted that the Segway® PT's safety record is as good as, if not better, than the record for wheelchairs and mobility scooters.

Most business commenters were opposed to the inclusion of the Segway® PT in the definition of "wheelchair" but were supportive of its inclusion as an "other power-driven mobility device." They raised industry- or venue-specific concerns about including the Segway® PT in the definition of "wheelchair." For example, civic centers, arenas, and theaters were concerned about the impact on sight-line requirements if Segway® PT users remain on their devices in a designated wheelchair seating area; amusement parks expressed concern that rides have been designed, purchased, and installed to enable wheelchair users to transfer easily or to accommodate wheelchairs on the ride itself; and retail stores mentioned size constraints in some stores. Nearly all business commenters expressed concern—and perceived liability issues—related to having to store or stow the Segway® PT, particularly if it could

not be stored in an upright position. These commenters cited concerns about possible damage to the device, injury to customers who may trip over it, and theft of the device as a result of not being able to stow the Segway® PT securely.

Virtually every business commenter mentioned concerns about rider safety, as well as concerns for pedestrians unexpectedly encountering these devices or being hit or run over by these devices in crowded venues where maneuvering space is limited. Their main safety objection to the inclusion of the Segway® PT in the definition of "wheelchair" was that the maximum speed at which the Segway® PT can operate is far faster than that of motorized wheelchairs. There was a universal unease among these commenters with regard to relying on the judgment of the Segway® PT user to exercise caution because its top speed is far in excess of a wheelchair's top speed. Many other safety concerns were industry-specific. For example, amusement parks were concerned that the Segway® PT is much taller than children; that it is too quiet to warn pedestrians, particularly those with low vision or who are blind, of their presence; that it may keep moving after a rider has fallen off or power system fails; and that it has a full-power override which automatically engages when an obstacle is encountered. Hotels and retail stores mentioned that maneuvering the Segway® PT through their tight quarters would create safety hazards.

Business commenters also expressed concern that if the Segway® PT were included in the definition of "wheelchair" they would have to make physical changes to their facilities to accommodate Segway® PT riders who stand much taller in these devices than do users of wheelchairs. They also were concerned that if the Segway® PT was included in the definition of "wheelchair," they would have no ability to assess whether it is appropriate to allow the entry of the Segway® PT into their facilities the way they would have if the device is categorized as an "other power-driven mobility device."

Many disability advocacy and nonprofit commenters did not support the inclusion of the Segway® PT in the definition of "wheelchair." Paramount to these commenters was the maintenance of existing protections for wheelchair users. Because there was unanimous agreement that wheelchair use rarely, if ever, may be restricted, these commenters strongly favored categorizing wheelchairs separately from the Segway® PT and other power-driven mobility devices and applying the intended-use determinant to assign the devices to either category. They indicated that while they support the greatest degree of access in public accommodations for all persons with disabilities who require the use of mobility devices, they recognize that under certain circumstances allowing the

use of other power-driven mobility devices would result in a fundamental alteration or run counter to legitimate safety requirements necessary for the safe operation of a public accommodation. While these groups supported categorizing the Segway® PT as an “other power-driven mobility device,” they universally noted that because the Segway® PT does not present environmental concerns and is as safe to use as, if not safer than, a wheelchair, it should be accommodated in most circumstances.

The Department has considered all the comments and has concluded that it should not include the Segway® PT in the definition of “wheelchair.” The final rule provides that the test for categorizing a device as a wheelchair or an other power-driven mobility device is whether the device is designed primarily for use by individuals with mobility disabilities. Mobility scooters are included in the definition of “wheelchair” because they are designed primarily for users with mobility disabilities. However, because the current generation of EPAMDs, including the Segway® PT, was designed for recreational users and not primarily for use by individuals with mobility disabilities, the Department has decided to continue its approach of excluding EPAMDs from the definition of “wheelchair” and including them in the definition of “other power-driven mobility device.” Although EPAMDs, such as the Segway® PT, are not included in the definition of a “wheelchair,” public accommodations must assess whether they can make reasonable modifications to permit individuals with mobility disabilities to use such devices on their premises. The Department recognizes that the Segway® PT provides many benefits to those who use them as mobility devices, including a measure of privacy with regard to the nature of one’s particular disability, and believes that in the vast majority of circumstances, the application of the factors described in §36.311 for providing access to other-powered mobility devices will result in the admission of the Segway® PT.

Treatment of “manually-powered mobility aids.” The Department’s NPRM did not define the term “manually-powered mobility aids.” Instead, the NPRM included a non-exhaustive list of examples in §36.311(a). The NPRM queried whether the Department should maintain this approach to manually-powered mobility aids or whether it should adopt a more formal definition.

Only a few commenters addressed “manually-powered mobility aids.” Virtually all commenters were in favor of maintaining a non-exhaustive list of examples of “manually-powered mobility aids” rather than adopting a definition of the term. Of those who commented, a couple sought clarification of the term “manually-powered.” One commenter suggested that the term be

changed to “human-powered.” Other commenters requested that the Department include ordinary strollers in the non-exhaustive list of manually-powered mobility aids. Since strollers are not devices designed primarily for individuals with mobility disabilities, the Department does not consider them to be manually-powered mobility aids; however, strollers used in the context of transporting individuals with disabilities are subject to the same assessment required by the ADA’s reasonable modification standards at §36.302. The Department believes that because the existing approach is clear and understood easily by the public, no formal definition of the term “manually-powered mobility aids” is required.

Definition of “other power-driven mobility device.” The Department’s NPRM defined the term “other power-driven mobility device” in §36.104 as “any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.” 73 FR 34508, 34552 (June 17, 2008).

Business commenters mostly were supportive of the definition of “other power-driven mobility device” because it gave them the ability to develop policies pertaining to the admission of these devices, but they expressed concern that individuals will feign mobility disabilities so that they can use devices that are otherwise banned in public accommodations. Advocacy, nonprofit, and several individual commenters supported the definition of “other power-driven mobility device” because it allows new technologies to be added in the future, maintains the existing legal protections for wheelchairs, and recognizes that some devices, particularly the Segway® PT, which are not designed primarily for individuals with mobility disabilities, have beneficial uses for individuals with mobility disabilities.

Despite support for the definition of “other power-driven mobility device,” however, most advocacy and nonprofit commenters expressed at least some hesitation about the inclusion of fuel-powered mobility devices in the definition. While virtually all of these commenters noted that a blanket exclusion of any device that falls under the definition of “other power-driven mobility device” would violate basic civil rights concepts, they also specifically stated that certain devices, particularly off-highway vehicles, cannot be permitted in certain circumstances. They also made a distinction between the Segway® PT and other power-driven mobility devices, noting that the Segway® PT

should be accommodated in most circumstances because it satisfies the safety and environmental elements of the policy analysis. These commenters indicated that they agree that other power-driven mobility devices must be assessed, particularly as to their environmental impact, before they are accommodated.

Business commenters were even less supportive of the inclusion of fuel-powered devices in the other power-driven mobility devices category. They sought a complete ban on fuel-powered devices because they believe they are inherently dangerous and pose environmental and safety concerns.

Although many commenters had reservations about the inclusion of fuel-powered devices in the definition of other power-driven mobility devices, the Department does not want the definition to be so narrow that it would foreclose the inclusion of new technological developments, whether powered by fuel or by some other means. It is for this reason that the Department has maintained the phrase “any mobility device designed to operate in areas without defined pedestrian routes” in the final rule’s definition of other power-driven mobility devices. The Department believes that the limitations provided by “fundamental alteration” and the ability to impose legitimate safety requirements will likely prevent the use of fuel and combustion engine-driven devices indoors, as well as in outdoor areas with heavy pedestrian traffic. The Department notes, however, that in the future technological developments may result in the production of safe fuel-powered mobility devices that do not pose environmental and safety concerns. The final rule allows consideration to be given as to whether the use of a fuel-powered device would create a substantial risk of serious harm to the environment or natural or cultural resources, and to whether the use of such a device conflicts with Federal land management laws or regulations; this aspect of the final rule will further limit the inclusion of fuel-powered devices where they are not appropriate. Consequently, the Department has maintained fuel-powered devices in the definition of “other power-driven mobility devices.” The Department has also added language to the definition of “other power-driven mobility device” to reiterate that the definition does not apply to Federal wilderness areas, which are not covered by title II of the ADA; the use of wheelchairs in such areas is governed by section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

“Place of Public Accommodation”

Definition of “place of lodging.” The NPRM stated that a covered “place of lodging” is a facility that provides guest rooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), to

which the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, particularly including factors such as: (1) An on-site proprietor and reservations desk; (2) rooms available on a walk-up basis; (3) linen service; and (4) a policy of accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. The NPRM stated that timeshares and condominiums or corporate hotels that did not meet this definition would not be covered by §36.406(c) of the proposed regulation, but may be covered by the requirements of the Fair Housing Act (FHAAct).

In the NPRM, the Department sought comment on its definition of “place of lodging,” specifically seeking public input on whether the most appropriate time period for identifying facilities used for stays that primarily are short-term in nature should be set at 2 weeks or 30 days.

The vast majority of the comments received by the Department supported the use of a 30-day limitation on places of lodging as more consistent with building codes, local laws, and common real estate practices that treat stays of 30 days or less as transient rather than residential use. One commenter recommended using the phrase “fourteen days or less.” Another commenter objected to any bright line standard, stating that the difference between two weeks and 30 days for purposes of title III is arbitrary, viewed in light of conflicting regulations by the States. This commenter argued the Department should continue its existing practice under title III of looking to State law as one factor in determining whether a facility is used for stays that primarily are short-term in nature.

The Department is persuaded by the majority of commenters to adopt a 30-day guideline for the purposes of identifying facilities that primarily are short-term in nature and has modified the section accordingly. The 30-day guideline is intended only to determine when the final rule’s transient lodging provisions apply to a facility. It does not alter an entity’s obligations under any other applicable statute. For example, the Department recognizes that the FHAAct does not employ a bright line standard for determining which facilities qualify as residential facilities under that Act and that there are circumstances where units in facilities that meet the definition of places of lodging will be covered under both the ADA and the FHAAct and will have to comply with the requirements of both laws.

The Department also received comments about the factors used in the NPRM’s definition of “place of lodging.” One commenter proposed modifications to the definition as

follows: changing the words “guest rooms” to “accommodations for sleeping”; and adding a fifth factor that states that “the in-room decor, furnishings and equipment being specified by the owner or operator of the lodging operation rather than generally being determined by the owner of the individual unit or room.” The Department does not believe that “guest room” should be changed to “accommodations for sleeping.” Such a change would create confusion because the transient lodging provisions in the 2004 ADAAG use the term “guest rooms” and not “accommodations for sleeping.” In addition, the Department believes that it would be confusing to add a factor relating to who dictates the in-room decor and furnishings in a unit or room, because there may be circumstances where particular rental programs require individual owners to use certain decor and furnishings as a condition of participating in that program.

One commenter stated that the factors the Department has included for determining whether a rental unit is a place of lodging for the purposes of title III, and therefore a “place of public accommodation” under the ADA, address only the way an establishment appears to the public. This commenter recommended that the Department also consider the economic relationships among the unit owners, rental managers, and homeowners’ associations, noting that where revenues are not pooled (as they are in a hotel), the economic relationships do not make it possible to spread the cost of providing accessibility features over the entire business enterprise. Another commenter argued that private ownership of sleeping accommodations sets certain facilities apart from traditional hotels, motels, and inns, and that the Department should revise the definition of places of lodging to exempt existing places of lodging that have sleeping accommodations separately owned by individual owners (*e.g.*, condominiums) from the accessible transient lodging guest room requirements in sections 224 and 806 of the 2004 ADAAG, although the commenter agreed that newly constructed places of lodging should meet those standards.

One commenter argued that the Department’s proposed definition of place of lodging does not reflect fully the nature of a timeshare facility and one single definition does not fit timeshares, condo hotels, and other types of rental accommodations. This commenter proposed that the Department adopt a separate definition for timeshare resorts as a subcategory of place of lodging. The commenter proposed defining timeshare resorts as facilities that provide the recurring right to occupancy for overnight accommodations for the owners of the accommodations, and other occupancy rights for owners exchanging their interests or members of the public for stays that primarily are short-

term in nature (generally 30 consecutive days or less), where neither the owner nor any other occupant has the right or intent to use the unit or room on other than a temporary basis for vacation or leisure purposes. This proposed definition also would describe factors for determining when a timeshare resort is operating in a manner similar to a hotel, motel, or inn, including some or all of the following: rooms being available on a walk-in or call-in basis; housekeeping or linen services being available; on-site management; and reservations being accepted for a room type without guaranteeing any guest or owner use of a particular unit or room until check-in, without a prior lease or security deposit. Timeshares that do not meet this definition would not be subject to the transient lodging standards.

The Department has considered these comments and has revised the definition of “place of accommodation” in §36.104 to include a revised subcategory (B), which more clearly defines the factors that must be present for a facility that is not an inn, motel, or hotel to qualify as a place of lodging. These factors include conditions and amenities similar to an inn, motel, or hotel, including on- or off-site management and reservations service, rooms available on a walk-up or call-in basis, availability of housekeeping or linen service, and accepting reservations for a room type without guaranteeing a particular unit or room until check-in without a prior lease or security deposit.

Although the Department understands some of the concerns about the application of the ADA requirements to places of lodging that have ownership structures that involve individually owned units, the Department does not believe that the definitional section of the regulation is the place to address these concerns and has addressed them in §36.406(c)(2) and the accompanying discussion in Appendix A.

“Qualified Interpreter”

In the NPRM, the Department proposed adding language to the definition of “qualified interpreter” to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued-speech interpreters. As the Department explained, not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. In addition, someone with only a rudimentary familiarity with sign language or finger spelling is not qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

As further explained, different situations will require different types of interpreters. For example, an oral interpreter who has

special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communication (*e.g.*, in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

The Department received many comments regarding the proposed modifications to the definition of "qualified interpreter." Many commenters requested that the Department include within the definition a requirement that interpreters be certified, particularly if they reside in a State that licenses or certifies interpreters. Other commenters opposed a certification requirement as unduly limiting, noting that an interpreter may well be qualified even if that same interpreter is not certified. These commenters noted the absence of nationwide standards or universally accepted criteria for certification.

On review of this issue, the Department has decided against imposing a certification requirement under the ADA. It is sufficient under the ADA that the interpreter be qualified. With respect to the proposed additions to the rule, most commenters supported the expansion of the list of qualified interpreters, and some advocated for the inclusion of other types of interpreters on the list as well, such as deaf-blind interpreters, certified deaf interpreters, and speech-to-speech interpreters. As these commenters explained, deaf-blind interpreters are interpreters who have specialized skills and training to interpret for individuals who are deaf and blind. Certified deaf interpreters are deaf or hard of hearing interpreters who work with hearing sign language interpreters to meet the specific communication needs of deaf individuals. Speech-to-speech interpreters have special skill and training to interpret for individuals who have speech disabilities.

The list of interpreters in the definition of "qualified interpreter" is illustrative, and the Department does not believe it is necessary or appropriate to attempt to provide an exhaustive list of qualified interpreters. Accordingly, the Department has decided not to expand the proposed list. However, if a deaf and blind individual needs interpreting services, an interpreter who is qualified to handle the interpreting needs of that individual may be required. The guiding criterion is that the public accommodation

must provide appropriate auxiliary aids and services to ensure effective communication with the individual.

Commenters also suggested various definitions for the term "cued-speech interpreters," and different descriptions of the tasks they performed. After reviewing the various comments, the Department has determined that it is more accurate and appropriate to refer to such individuals as "cued-language transliterators." Likewise, the Department has changed the term "oral interpreters" to "oral transliterators." These two changes have been made to distinguish between sign language interpreters, who translate one language into another language (*e.g.*, ASL to English and English to ASL), from transliterators, who interpret within the same language between deaf and hearing individuals. A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. While the Department included definitions for "cued-speech interpreter" and "oral interpreter" in the regulatory text proposed in the NPRM, the Department has decided that it is unnecessary to include such definitions in the text of the final rule.

Many commenters questioned the proposed deletion of the requirement that a qualified interpreter be able to interpret both receptively and expressively, noting the importance of both these skills. Commenters noted that this phrase was carefully crafted in the original regulation to make certain that interpreters both (1) are capable of understanding what a person with a disability is saying and (2) have the skills needed to convey information back to that individual. These are two very different skill sets and both are equally important to achieve effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an ASL user (receptive skills) and the ability to interpret complicated medical information—presented by medical staff in English—back to that individual in ASL (expressive skills). The Department agrees and has put the phrase "both receptively and expressively" back in the definition.

Several advocacy groups suggested that the Department make clear in the definition of qualified interpreter that the interpreter may appear either on-site or remotely using a video remote interpreting (VRI) service. Given that the Department has included in

this rule both a definition of VRI services and standards that such services must satisfy, such an addition to the definition of qualified interpreter is appropriate.

After consideration of all relevant information submitted during the public comment period, the Department has modified the definition from that initially proposed in the NPRM. The final definition now states that “[q]ualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.”

“Qualified Reader”

The 1991 title III regulation identified a qualified reader as an auxiliary aid, but did not define the term. Based upon the Department’s investigation of complaints alleging that some entities have provided ineffective readers, the Department proposed in the NPRM to define “qualified reader” similarly to “qualified interpreter” to ensure that public accommodations select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. This proposal was suggested in order to make clear to public accommodations that a failure to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

The Department received comments supporting the inclusion in the regulation of a definition of a “qualified reader.” Some commenters suggested the Department add to the definition a requirement prohibiting the use of a reader whose accent, diction, or pronunciation makes full comprehension of material being read difficult. Another commenter requested that the Department include a requirement that the reader “will follow the directions of the person for whom he or she is reading.” Commenters also requested that the Department define “accurately” and “effectively” as used in this definition.

While the Department believes that the regulatory definition proposed in the NPRM adequately addresses these concerns, the Department emphasizes that a reader, in order to be “qualified,” must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a bar examination, that reader, in order to be qualified, must know the proper pronunciation of all legal terminology used and must be sufficiently articulate to be easily under-

stood by the individual with a disability for whom he or she is reading. In addition, the terms “effectively” and “accurately” have been successfully used and understood in the Department’s existing definition of “qualified interpreter” since 1991 without specific regulatory definitions. Instead, the Department has relied upon the common use and understanding of those terms from standard English dictionaries. Thus, the definition of “qualified reader” has not been changed from that contained in the NPRM. The final rule defines a “qualified reader” to mean “a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.”

“Service Animal”

Section 36.104 of the 1991 title III regulation defines a “service animal” as “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.” Section 36.302(c)(1) of the 1991 title III regulation requires that “[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” Section 36.302(c)(2) of the 1991 title III regulation states that “a public accommodation [is not required] to supervise or care for a service animal.”

The Department has issued guidance and provided technical assistance and publications concerning service animals since the 1991 regulations became effective. In the NPRM, the Department proposed to modify the definition of service animal and asked for public input on several issues related to the service animal provisions of the 1991 title III regulation: whether the Department should clarify the phrase “providing minimal protection” in the definition or remove it; whether there are any circumstances where a service animal “providing minimal protection” would be appropriate or expected; whether certain species should be eliminated from the definition of “service animal,” and, if so, which types of animals should be excluded; whether “common domestic animal” should be part of the definition; and whether a size or weight limitation should be imposed for common domestic animals, even if the animal satisfies the “common domestic animal” part of the NPRM definition.

The Department received extensive comments on these issues, as well as requests to

clarify the obligations of public accommodations to accommodate individuals with disabilities who use service animals, and has modified the final rule in response. In the interests of avoiding unnecessary repetition, the Department has elected to discuss the issues raised in the NPRM questions about service animals and the corresponding public comments in the following discussion of the definition of “service animal.”

The Department’s final rule defines “service animal” as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.”

This definition has been designed to clarify a key provision of the ADA. Many covered entities indicated that they are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. Individuals with disabilities who use trained guide or service dogs are concerned that if untrained or unusual animals are termed “service animals,” their own right to use guide or service dogs may become unnecessarily restricted or questioned. Some individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, in order to gain access to hotels, restaurants, and other places of public accommodation. The increasing use of wild, exotic, or unusual species, many of which are untrained, as service animals has also added to the confusion.

Finally, individuals with disabilities who have the legal right under the Fair Housing Act (FHA) to use certain animals in their homes as a reasonable accommodation to

their disabilities have assumed that their animals also qualify under the ADA. This is not necessarily the case, as discussed below.

The Department recognizes the diverse needs and preferences of individuals with disabilities protected under the ADA, and does not wish to unnecessarily impede individual choice. Service animals play an integral role in the lives of many individuals with disabilities, and with the clarification provided by the final rule, individuals with disabilities will continue to be able to use their service animals as they go about their daily activities. The clarification will also help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred. A more detailed analysis of the elements of the definition and the comments responsive to the service animal provisions of the NPRM follows.

Providing minimal protection. The 1991 title III regulation included language stating that “minimal protection” was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability. In the Department’s “ADA Business Brief on Service Animals” (2002), the Department interpreted the “minimal protection” language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). The Department received many comments in response to the question of whether the “minimal protection” language should be clarified. Many commenters urged the removal of the “minimal protection” language from the service animal definition for two reasons: (1) The phrase can be interpreted to allow any dog that is trained to be aggressive to qualify as a service animal simply by pairing the animal with a person with a disability; and (2) The phrase can be interpreted to allow any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent, and thus sufficient to meet the minimal protection standard. These commenters argued, and the Department agrees, that these interpretations were not contemplated under the original title III regulation.

While many commenters stated that they believe that the “minimal protection” language should be eliminated, other commenters recommended that the language be clarified, but retained. Commenters favoring clarification of the term suggested that the Department explicitly exclude the function of attack or exclude those animals that are trained solely to be aggressive or protective. Other commenters identified non-violent behavioral tasks that could be construed as minimally protective, such as interrupting self-mutilation, providing safety checks and room searches, reminding the individual to

take medications, and protecting the individual from injury resulting from seizures or unconsciousness.

Several commenters noted that the existing direct threat defense, which allows the exclusion of a service animal if the animal exhibits unwarranted or unprovoked violent behavior or poses a direct threat, prevents the use of “attack dogs” as service animals. One commenter noted that the use of a service animal trained to provide “minimal protection” may impede access to care in an emergency, for example, where the first responder is unable or reluctant to approach a person with a disability because the individual’s service animal is in a protective posture suggestive of aggression.

Many organizations and individuals stated that in the general dog training community, “protection” is code for attack or aggression training and should be removed from the definition. Commenters stated that there appears to be a broadly held misconception that aggression-trained animals are appropriate service animals for persons with post traumatic stress disorder (PTSD). While many individuals with PTSD may benefit by using a service animal, the work or tasks performed appropriately by such an animal would not involve unprovoked aggression, but could include actively cuing the individual by nudging or pawing the individual to alert to the onset of an episode and removing the individual from the anxiety-provoking environment.

The Department recognizes that despite its best efforts to provide clarification, the “minimal protection” language appears to have been misinterpreted. While the Department maintains that protection from danger is one of the key functions that service animals perform for the benefit of persons with disabilities, the Department recognizes that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal. Therefore, the Department has decided to modify the “minimal protection” language to read “non-violent protection,” thereby excluding so-called “attack dogs” or dogs with traditional “protection training” as service animals. The Department believes that this modification to the service animal definition will eliminate confusion, without restricting unnecessarily the type of work or tasks that service animals may perform. The Department’s modification also clarifies that the crime-deterrent effect of a dog’s presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

Alerting to intruders. The phrase “alerting to intruders” is related to the issues of minimal protection and the work or tasks an animal may perform to meet the definition of a service animal. In the original 1991 regulatory text, this phrase was intended to iden-

tify service animals that alert individuals who are deaf or hard of hearing to the presence of others. This language has been misinterpreted by some to apply to dogs that are trained specifically to provide aggressive protection, resulting in the assertion that such training qualifies a dog as a service animal under the ADA. The Department reiterates that public accommodations are not required to admit any animal whose use poses a direct threat. In addition, the Department has decided to remove the word “intruders” from the service animal definition and replace it with the phrase “the presence of people or sounds.” The Department believes this clarifies that so-called “attack training” or other aggressive response types of training that cause a dog to provide an aggressive response do not qualify a dog as a service animal under the ADA.

Conversely, if an individual uses a breed of dog that is perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs, but the dog is under the control of the individual with a disability and does not exhibit aggressive behavior, the public accommodation cannot exclude the individual or the animal from the place of public accommodation. The animal can only be removed if it engages in the behaviors mentioned in §36.302(c) (as revised in the final rule) or if the presence of the animal constitutes a fundamental alteration to the nature of the goods, services, facilities, and activities of the place of public accommodation.

“Doing work” or “performing tasks.” The NPRM proposed that the Department maintain the requirement first articulated in the 1991 title III regulation that in order to qualify as a service animal, the animal must “perform tasks” or “do work” for the individual with a disability. The phrases “perform tasks” and “do work” describe what an animal must do for the benefit of an individual with a disability in order to qualify as a service animal.

The Department received a number of comments in response to the NPRM proposal urging the removal of the term “do work” from the definition of a service animal. These commenters argued that the Department should emphasize the performance of tasks instead. The Department disagrees. Although the common definition of work includes the performance of tasks, the definition of work is somewhat broader, encompassing activities that do not appear to involve physical action.

One service dog user stated that, in some cases, “critical forms of assistance can’t be construed as physical tasks,” noting that the manifestations of “brain-based disabilities,” such as psychiatric disorders and autism, are as varied as their physical counterparts. The Department agrees with this

statement but cautions that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the individual is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.

The NPRM contained an example of “doing work” that stated “a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place.” 73 FR 34508, 34521 (June 17, 2008). Several commenters objected to the use of this example, arguing that grounding was not a “task” and therefore the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that “grounding” should not be included as an example of “work” because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.

It is the Department’s view that an animal that is trained to “ground” a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person’s disability. It is the fact that the animal is trained to respond to the individual’s needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event.

One commenter suggested defining the term “task,” presumably to improve the understanding of the types of services performed by an animal that would be sufficient to qualify the animal for coverage. The Department believes that the common definition of the word “task” is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has added examples of other kinds of work or tasks to help illustrate and provide

clarity to the definition. After careful evaluation of this issue, the Department has concluded that the phrases “do work” and “perform tasks” have been effective during the past two decades to illustrate the varied services provided by service animals for the benefit of individuals with all types of disabilities. Thus, the Department declines to depart from its longstanding approach at this time.

Species limitations. When the Department originally issued its title III regulation in the early 1990s, the Department did not define the parameters of acceptable animal species. At that time, few anticipated the variety of animals that would be promoted as service animals in the years to come, which ranged from pigs and miniature horses to snakes, iguanas, and parrots. The Department has followed this particular issue closely, keeping current with the many unusual species of animals represented to be service animals. Thus, the Department has decided to refine further this aspect of the service animal definition in the final rule.

The Department received many comments from individuals and organizations recommending species limitations. Several of these commenters asserted that limiting the number of allowable species would help stop erosion of the public’s trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards. Several commenters suggested that other species would be acceptable if those animals could meet nationally recognized behavioral standards for trained service dogs. Other commenters asserted that certain species of animals (*e.g.*, reptiles) cannot be trained to do work or perform tasks, so these animals would not be covered.

In the NPRM, the Department used the term “common domestic animal” in the service animal definition and excluded reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents from the service animal definition. 73 FR 34508, 34553 (June 17, 2008). However, the term “common domestic animal” is difficult to define with precision due to the increase in the number of domesticated species. Also, several State and local laws define a “domestic” animal as an animal that is not wild.

The Department is compelled to take into account the practical considerations of certain animals and to contemplate their suitability in a variety of public contexts, such as restaurants, grocery stores, hospitals, and performing arts venues, as well as suitability for urban environments. The Department agrees with commenters’ views that limiting the number and types of species recognized as service animals will provide greater predictability for public accommodations as

well as added assurance of access for individuals with disabilities who use dogs as service animals. As a consequence, the Department has decided to limit this rule's coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities.

Wild animals, monkeys, and other nonhuman primates. Numerous business entities endorsed a narrow definition of acceptable service animal species, and asserted that there are certain animals (*e.g.*, reptiles) that cannot be trained to do work or perform tasks. Other commenters suggested that the Department should identify excluded animals, such as birds and llamas, in the final rule. Although one commenter noted that wild animals bred in captivity should be permitted to be service animals, the Department has decided to make clear that all wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates, including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential for serious injury and zoonotic [animal to human disease transmission] risks." AVMA Position Statement, *Nonhuman Primates as Assistance Animals* (2005), available at http://www.avma.org/issues/policy/nonhuman_primates.asp (last visited June 24, 2010).

An organization that trains capuchin monkeys to provide in-home services to individuals with paraplegia and quadriplegia was in substantial agreement with the AVMA's views but requested a limited recognition in the service animal definition for the capuchin monkeys it trains to provide assistance for persons with disabilities. The organization commented that its trained capuchin monkeys undergo scrupulous veterinary examinations to ensure that the animals pose no health risks, and are used by individuals with disabilities exclusively in their homes. The organization acknowledged that the capuchin monkeys it trains are not necessarily suitable for use in a place of public accommodation but noted that the monkeys may need to be used in circumstances that implicate title III coverage, *e.g.*, in the event the handler had to leave home due to an emergency, to visit a veterinarian, or for the initial delivery of the monkey to the individual with a disability. The organization noted that several State and local government en-

tities have local zoning, licensing, health, and safety laws that prohibit non-human primates, and that these prohibitions would prevent individuals with disabilities from using these animals even in their homes.

The organization argued that including capuchin monkeys under the service animal umbrella would make it easier for individuals with disabilities to obtain reasonable modifications of State and local licensing, health, and safety laws that would permit the use of these monkeys. The organization argued that this limited modification to the service animal definition was warranted in view of the services these monkeys perform, which enable many individuals with paraplegia and quadriplegia to live and function with increased independence.

The Department has carefully considered the potential risks associated with the use of nonhuman primates as service animals in places of public accommodation, as well as the information provided to the Department about the significant benefits that trained capuchin monkeys provide to certain individuals with disabilities in residential settings. The Department has determined, however, that nonhuman primates, including capuchin monkeys, will not be recognized as service animals for purposes of this rule because of their potential for disease transmission and unpredictable aggressive behavior. The Department believes that these characteristics make nonhuman primates unsuitable for use as service animals in the context of the wide variety of public settings subject to this rule. As the organization advocating the inclusion of capuchin monkeys acknowledges, capuchin monkeys are not suitable for use in public facilities.

The Department emphasizes that it has decided only that capuchin monkeys will not be included in the definition of service animals for purposes of its regulation implementing the ADA. This decision does not have any effect on the extent to which public accommodations are required to allow the use of such monkeys under other Federal statutes, like the FHAct or the Air Carrier Access Act (ACAA). For example, a public accommodation that also is considered to be a "dwelling" may be covered under both the ADA and the FHAct. While the ADA does not require such a public accommodation to admit people with service monkeys, the FHAct may. Under the FHAct an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a "reasonable accommodation" that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat. In some cases, the right of an individual to have an animal under the FHAct may conflict with State or local laws that prohibit all individuals, with or without disabilities,

from owning a particular species. However, in this circumstance, an individual who wishes to request a reasonable modification of the State or local law must do so under the FHAct, not the ADA.

Having considered all of the comments about which species should qualify as service animals under the ADA, the Department has determined the most reasonable approach is to limit acceptable species to dogs.

Size or weight limitations. The vast majority of commenters did not support a size or weight limitation. Commenters were typically opposed to a size or weight limit because many tasks performed by service animals require large, strong dogs. For instance, service animals may perform tasks such as providing balance and support or pulling a wheelchair. Small animals may not be suitable for large adults. The weight of the service animal user is often correlated with the size and weight of the service animal. Others were concerned that adding a size and weight limit would further complicate the difficult process of finding an appropriate service animal. One commenter noted that there is no need for a limit because “if, as a practical matter, the size or weight of an individual’s service animal creates a direct threat or fundamental alteration to a particular public entity or accommodation, there are provisions that allow for the animal’s exclusion or removal.” Some common concerns among commenters in support of a size and weight limit were that a larger animal may be less able to fit in various areas with its handler, such as toilet rooms and public seating areas, and that larger animals are more difficult to control.

Balancing concerns expressed in favor of and against size and weight limitations, the Department has determined that such limitations would not be appropriate. Many individuals of larger stature require larger dogs. The Department believes it would be inappropriate to deprive these individuals of the option of using a service dog of the size required to provide the physical support and stability these individuals may need to function independently. Since large dogs have always served as service animals, continuing their use should not constitute fundamental alterations or impose undue burdens on public accommodations.

Breed limitations. A few commenters suggested that certain breeds of dogs should not be allowed to be used as service animals. Some suggested that the Department should defer to local laws restricting the breeds of dogs that individuals who reside in a community may own. Other commenters opposed breed restrictions, stating that the breed of a dog does not determine its propensity for aggression and that aggressive and non-aggressive dogs exist in all breeds.

The Department does not believe that it is either appropriate or consistent with the

ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, *e.g.*, German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual’s home jurisdiction but is nonetheless banned by other jurisdictions. Public accommodations have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal’s actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Recognition of psychiatric service animals, but not “emotional support animals.” The definition of “service animal” in the NPRM stated the Department’s longstanding position that emotional support animals are not included in the definition of “service animal.” The proposed text provided that “[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.” 73 FR 34508, 34553 (June 17, 2008).

Many advocacy organizations expressed concern and disagreed with the exclusion of comfort and emotional support animals. Others have been more specific, stating that individuals with disabilities may need their emotional support animals in order to have equal access. Some commenters noted that individuals with disabilities use animals that have not been trained to perform tasks directly related to their disability. These animals do not qualify as service animals under the ADA. These are emotional support or comfort animals.

Commenters asserted that excluding categories such as “comfort” and “emotional

support” animals recognized by laws such as the FHAct or the ACAA is confusing and burdensome. Other commenters noted that emotional support and comfort animals perform an important function, asserting that animal companionship helps individuals who experience depression resulting from multiple sclerosis.

Some commenters explained the benefits emotional support animals provide, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional well-being. They contended that without the presence of an emotional support animal in their lives they would be disadvantaged and unable to participate in society. These commenters were concerned that excluding this category of animals will lead to discrimination against and excessive questioning of individuals with non-visible or non-apparent disabilities. Other commenters expressing opposition to the exclusion of individually trained “comfort” or “emotional support” animals asserted that the ability to soothe or de-escalate and control emotion is “work” that benefits the individual with the disability.

Many commenters requested that the Department carve out an exception that permits current or former members of the military to use emotional support animals. They asserted that a significant number of service members returning from active combat duty have adjustment difficulties due to combat, sexual assault, or other traumatic experiences while on active duty. Commenters noted that some current or former members of the military service have been prescribed animals for conditions such as PTSD. One commenter stated that service women who were sexually assaulted while in the military use emotional support animals to help them feel safe enough to step outside their homes. The Department recognizes that many current and former members of the military have disabilities as a result of service-related injuries that may require emotional support and that such individuals can benefit from the use of an emotional support animal and could use such animal in their home under the FHAct. However, having carefully weighed the issues, the Department believes that its final rule appropriately addresses the balance of issues and concerns of both the individual with a disability and the public accommodation. The Department also notes that nothing in this part prohibits a public entity from allowing current or former military members or anyone else with disabilities to utilize emotional support animals if it wants to do so.

Commenters asserted the view that if an animal’s “mere presence” legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an ani-

mal should qualify as a “service animal.” Commenters noted that the focus should be on the nature of a person’s disability, the difficulties the disability may impose and whether the requested accommodation would legitimately address those difficulties, not on evaluating the animal involved. The Department understands this approach has benefited many individuals under the FHAct and analogous State law provisions, where the presence of animals poses fewer health and safety issues and where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of public accommodations, such as restaurants, hospitals, hotels, retail establishments, and assembly areas.

Under the Department’s previous regulatory framework, some individuals and entities assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the 1991 title III regulation. The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department’s present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding individuals to take medicine, providing safety checks or room searches for individuals with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulation was promulgated, service animals have been trained to assist individuals with many different types of disabilities.

In the final rule, the Department has retained its position on the exclusion of emotional support animals from the definition of “service animal.” The definition states that “[t]he provision of emotional support, well-being, comfort, or companionship * * * do[es] not constitute work or tasks for the purposes of this definition.” The Department notes, however, that the exclusion of emotional support animals from coverage in the final rule does not mean that individuals with psychiatric or mental disabilities cannot use service animals that meet the regulatory

definition. The final rule defines service animal as follows: “Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” This language simply clarifies the Department’s longstanding position.

The Department’s position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and the DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations, case law, and possibly State or local laws governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA. Public officials, housing providers, and others who make decisions relating to animals in residential and transportation settings should consult the Federal, State, and local laws that apply in those areas (e.g., the FHAct regulations of HUD and the ACAA) and not rely on the ADA as a basis for reducing those obligations.

Retain term “service animal.” Some commenters asserted that the term “assistance animal” is a term of art and should replace the term “service animal”; however, the majority of commenters preferred the term “service animal” because it is more specific. The Department has decided to retain the term “service animal” in the final rule. While some agencies, like HUD, use the terms “assistance animal,” “assistive animal,” or “support animal,” these terms are used to denote a broader category of animals than is covered by the ADA. The Department has decided that changing the term used in the final rule would create confusion, particularly in view of the broader parameters for coverage under the FHAct, cf. Preamble to HUD’s Final Rule for Pet Ownership for the Elderly and Persons with Disabilities, 73 FR 63834–38 (Oct. 27, 2008); HUD Handbook No. 4350.3 Rev-1, Chapter 2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3> (last visited June 24, 2010). Moreover, as discussed above, the Department’s definition of “service animal” in the final rule does not affect the rights of individuals

with disabilities who use assistance animals in their homes under the FHAct or who use “emotional support animals” that are covered under the ACAA and its implementing regulations. See 14 CFR 382.7 *et seq.*; see also Department of Transportation, *Guidance Concerning Service Animals in Air Transportation*, 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on aircraft).

“Video Remote Interpreting (VRI) Services”

In the NPRM, the Department proposed adding “Video Interpreting Services (VIS)” to the list of auxiliary aids available to provide effective communication. In the preamble to the NPRM, VIS was defined as “a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.” 73 FR 34508, 34522 (June 17, 2008). Comments from advocacy organizations and individuals unanimously requested that the Department use the term “video remote interpreting (VRI),” instead of VIS, for consistency with Federal Communications Commission (FCC) regulations, FCC Public Notice, DA-0502417 (Sept. 7, 2005), and with common usage by consumers. The Department has made that change throughout the regulation to avoid confusion and to make the regulation more consistent with existing regulations.

Many commenters also requested that the Department distinguish between VRI and “video relay service (VRS).” Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person, typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity.

VRS is a telephone service that enables persons with disabilities to use the telephone to communicate using video connections and is a more advanced form of relay service than the traditional voice to text telephones (TTY) relay systems that were recognized in

the 1991 title III regulation. More specifically, VRS is a video relay service using interpreters connected to callers by video hook-up and is designed to provide telephone services to persons who are deaf and use American Sign Language that are functionally equivalent to those services provided to users who are hearing. VRS is funded through the Interstate Telecommunications Relay Services Fund and overseen by the FCC. See 47 CFR 64.601(a)(26). There are no fees for callers to use the VRS interpreters and the video connection, although there may be relatively inexpensive initial costs to the title III entities to purchase the videophone or camera for on-line video connection, or other equipment to connect to the VRS service. The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.

Many commenters strongly recommended limiting the use of VRI to circumstances where it will provide effective communication. Commenters from advocacy groups and persons with disabilities expressed concern that VRI may not always be appropriate to provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI and some recommended requirements for equipment maintenance, high-speed, wide-bandwidth video links using dedicated lines or wireless systems, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions.

After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is

available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in §36.303(f).

SUBPART B—GENERAL REQUIREMENTS

Section 36.208(b) Direct Threat

The Department has revised the language of §36.208(b) (formerly §36.208(c) in the 1991 title III regulation) to include consideration of whether the provision of auxiliary aids or services will mitigate the risk that an individual will pose a direct threat to the health or safety of others. Originally, the reference to auxiliary aids or services as a mitigating factor was part of §36.208. However, that reference was removed from the section when, for editorial purposes, the Department removed the definition of "direct threat" from §36.208 and placed it in §36.104. The Department has put the reference to auxiliary aids or services as a mitigating factor back into §36.208(b) in order to maintain consistency with the current regulation.

Section 36.211 Maintenance of Accessible Features

Section 36.211 of the 1991 title III regulation provides that a public accommodation must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by individuals with disabilities. 28 CFR 36.211. In the NPRM, the Department clarified the application of this provision and proposed one change to the section to address the discrete situation in which the scoping requirements provided in the 2010 Standards reduce the number of required elements below the requirements of the 1991 Standards. In that discrete event, a public accommodation may reduce such accessible features in accordance with the requirements in the 2010 Standards.

The Department received only four comments on this proposed amendment. None of the commenters opposed the change. In the final rule, the Department has revised the section to make it clear that if the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by the

1991 Standards, then the public accommodation may reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards. One commenter, an association of convenience stores, urged the Department to expand the language of the section to include restocking of shelves as a permissible activity for isolated or temporary interruptions in service or access. It is the Department's position that a temporary interruption that blocks an accessible route, such as restocking of shelves, is already permitted by existing §36.211(b), which clarifies that "isolated or temporary interruptions in service or access due to maintenance or repairs" are permitted. Therefore, the Department will not make any additional changes in the language of §36.211 other than those discussed in the preceding paragraph.

SUBPART C—SPECIFIC REQUIREMENTS

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302(c) Service Animals

Section 36.302(c)(1) of the 1991 title III regulation states that "[g]enerally, a public accommodation shall modify [its] policies, practices, or procedures to permit the use of service animals by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The Department has decided to retain the scope of the 1991 title III regulation while clarifying the Department's longstanding policies and interpretations. Toward that end, the final rule has been revised to include the Department's policy interpretations as outlined in published technical assistance, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at <http://www.ada.gov/qasrvc.htm>, and *ADA Guide for Small Businesses* (1999), available at <http://www.ada.gov/smbustxt.htm>, and to add that a public accommodation may exclude a service animal in certain circumstances where the service animal fails to meet certain behavioral standards. The Department received extensive comments in response to proposed §36.302(c) from individuals, disability advocacy groups, organizations involved in training service animals, and public accommodations. Those comments and the Department's response are discussed below.

Exclusion of service animals. The 1991 regulatory provision in §36.302(c) addresses reasonable modification and remains unchanged in the final rule. However, based on comments received and the Department's analysis, the Department has decided to clarify those circumstances where otherwise eligible

service animals may be excluded by public accommodations.

In the NPRM, in §36.302(c)(2)(i), the Department proposed that a public accommodation may ask an individual with a disability to remove a service animal from the place of public accommodation if "[t]he animal is out of control and the animal's handler does not take effective action to control it." 73 FR 34508, 34553 (June 17, 2008). The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public accommodation must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public accommodation otherwise has reason to suspect that provocation or injury has occurred, the public accommodation should seek to determine the facts and, if provocation or injury occurred, the public accommodation should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the place of public accommodation. This language is unchanged in the final rule.

The NPRM also proposed language at §36.302(c)(2)(ii) to permit a public accommodation to exclude a service animal if the animal is not housebroken (*i.e.*, trained so that, absent illness or accident, the animal controls its waste elimination) or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (*e.g.*, repeated barking during a live performance). Several commenters were supportive of this NPRM language, but cautioned against overreaction by the public accommodation in these instances. One commenter noted that animals get sick, too, and that accidents occasionally happen. In these circumstances, simple clean up typically addresses the incident. Commenters noted that the public accommodation must be careful when it excludes a service animal on the basis of "fundamental alteration," asserting for example, that a public accommodation should not exclude a service animal for barking in an environment where other types of noise, such as loud cheering or a child crying, is tolerated. The Department maintains that the appropriateness of an exclusion can be assessed by

reviewing how a public accommodation addresses comparable situations that do not involve a service animal. The Department has retained in §36.302(c)(2) of the final rule the exception requiring animals to be housebroken. The Department has not retained the specific NPRM language stating that animals can be excluded if their presence or behavior fundamentally alters the nature of the service provided by the public accommodation, because the Department believes that this exception is covered by the general reasonable modification requirement contained in §36.302(c)(1).

The NPRM also proposed in §36.302(c)(2)(iii) that a service animal can be excluded where “[t]he animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.” 73 FR 34508, 34553 (June 17, 2008). Commenters were universally supportive of this provision as it makes express the discretion of a public accommodation to exclude a service animal that poses a direct threat. Several commenters cautioned against the overuse of this provision and suggested that the Department provide an example of the rule’s application. The Department has decided not to include regulatory language specifically stating that a service animal can be excluded if it poses a direct threat. The Department believes that the direct threat provision in §36.208 already provides this exception to public accommodations.

Access to a public accommodation following the proper exclusion of a service animal. The NPRM proposed that in the event a public accommodation properly excludes a service animal, the public accommodation must give the individual with a disability the opportunity to obtain the goods and services of the public accommodation without having the service animal on the premises. Most commenters welcomed this provision as a common sense approach. These commenters noted that they do not wish to preclude individuals with disabilities from the full and equal enjoyment of the goods and services simply because of an isolated problem with a service animal. The Department has elected to retain this provision in §36.302(c)(2).

Other requirements. The NPRM also proposed that the regulation include the following requirements: that the work or tasks performed by the service animal must be directly related to the handler’s disability; that a service animal must be individually trained to do work or perform a task, be housebroken, and be under the control of the handler; and that a service animal must have a harness, leash, or other tether. Most commenters addressed at least one of these issues in their responses. Most agreed that these provisions are important to clarify further the 1991 service animal regulation. The Department has moved the requirement that the work or tasks performed by the service

animal must be related directly to the individual’s disability to the definition of ‘service animal’ in §36.104. In addition, the Department has modified the proposed language relating to the handler’s control of the animal with a harness, leash, or other tether to state that “[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal’s safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler’s control (e.g., voice control, signals, or other effective means).” The Department has retained the requirement that the service animal must be individually trained, as well as the requirement that the service animal be housebroken.

Responsibility for supervision and care of a service animal. The 1991 title III regulation, in §36.302(c)(2), states that “[n]othing in this part requires a public accommodation to supervise or care for a service animal.” The NPRM modified this language to state that “[a] public accommodation is not responsible for caring for or supervising a service animal.” 73 FR 34508, 34553 (June 17, 2008). Most commenters did not address this particular provision. The Department notes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with a disability, the individual’s obligation to be responsible for the care and supervision of the service animal would be satisfied. The language of this section is retained, with minor modifications, in §36.302(c)(5) of the final rule.

Inquiries about service animals. The NPRM proposed language at §36.302(c)(6) setting forth parameters about how a public accommodation may determine whether an animal qualifies as a service animal. The proposed section stated that a public accommodation may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a public accommodation does not need.

This language is consistent with the policy guidance outlined in two Department publications, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at <http://www.ada.gov/qasrvcc.htm>, and *ADA Guide for Small Businesses* (1999), available at <http://www.ada.gov/smbustxt.htm>.

Although some commenters contended that the NPRM service animal provisions leave unaddressed the issue of how a public accommodation can distinguish between a psychiatric service animal, which is covered under the final rule, and a comfort animal, which is not, other commenters noted that the Department's published guidance has helped public accommodations to distinguish between service animals and pets on the basis of an individual's response to these questions. Accordingly, the Department has retained the NPRM language incorporating its guidance concerning the permissible questions into the final rule.

Some commenters suggested that a title III entity be allowed to require current documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities. The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.

Service animal access to areas of a public accommodation. The NPRM proposed at §36.302(c)(7) that an individual with a disability who uses a service animal has the same right of access to areas of a public accommodation as members of the public, program participants, and invitees. Commenters indicated that allowing individuals with disabilities to go with their service animals into the same areas as members of the public, program participants, clients, customers, patrons, or invitees is accepted practice by most places of public accommodation. The Department has included a slightly modified version of this provision in §36.302(c)(7) of the final rule.

The Department notes that under the final rule, a healthcare facility must also permit a

person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. See Centers for Disease Control and Prevention, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf (last visited June 24, 2010). A service animal may accompany its handler to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without taking added precautions.

Prohibition against surcharges for use of a service animal. In the NPRM, the Department proposed to incorporate the previously mentioned policy guidance, which prohibits the assessment of a surcharge for the use of a service animal, into proposed §36.302(c)(8). Several commenters agreed that this provision makes clear the obligation of a place of public accommodation to admit an individual with a service animal without surcharges, and that any additional costs imposed should be factored into the overall cost of doing business and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user. Commenters also noted that service animal users cannot be required to comply with other requirements that are not generally applicable to other persons. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animals. The Department has retained this language, with minor modifications, in the final rule at §36.302(c)(8).

Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals

be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

Some commenters proposed specific behavior or training standards for service animals, arguing that without such standards, the public has no way to differentiate between untrained pets and service animals. Many of the suggested behavior or training standards were lengthy and detailed. The Department believes that this rule addresses service animal behavior sufficiently by including provisions that address the obligations of the service animal user and the circumstances under which a service animal may be excluded, such as the requirements that an animal be housebroken and under the control of its handler.

Miniature horses. The Department has been persuaded by commenters and the available research to include a provision that would require public accommodations to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. However, an organization that developed a program to train miniature horses, modeled on the program used for guide dogs, began training miniature horses in 1991.

Although commenters generally supported the species limitations proposed in the NPRM, some were opposed to the exclusion of miniature horses from the definition of a service animal. These commenters noted that these animals have been providing assistance to persons with disabilities for many years. Miniature horses were suggested by some commenters as viable alternatives to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Another consideration mentioned in favor of the use of miniature horses is the longer life span and strength of miniature horses in comparison to dogs. Specifically, miniature horses can provide service

for more than 25 years while dogs can provide service for approximately seven years, and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. These animals generally range in height from 24 inches to 34 inches measured to the withers, or shoulders, and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs, such as Labrador Retrievers, Great Danes, and Mastiffs. Similar to dogs, miniature horses can be trained through behavioral reinforcement to be "housebroken." Most miniature service horse handlers and organizations recommend that when the animals are not doing work or performing tasks, the miniature horses should be kept outside in a designated area instead of indoors in a house.

According to information provided by an organization that trains service horses, these miniature horses are trained to provide a wide array of services to their handlers, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. According to the commenter, miniature horses are particularly effective for large stature individuals. The animal can be trained to stand (and in some cases, lie down) at the handler's feet in venues where space is at a premium, such as assembly areas or inside some vehicles that provide public transportation. Some individuals with disabilities have traveled by train and have flown commercially with their miniature horses.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the Department has added a specific provision at §36.302(c)(9) of the final rule covering miniature horses. Under this provision, public accommodations must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The public accommodation may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse, whether the handler has sufficient control of the miniature horse, whether the miniature horse is housebroken, and

whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)(3)B–(8) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 36.302(c)(9). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the services provided.

Section 36.302(e) Hotel Reservations

Section 36.302 of the 1991 title III regulation requires public accommodations to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford access to any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. Hotels, timeshare resorts, and other places of lodging are subject to this requirement and must make reasonable modifications to reservations policies, practices, or procedures when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms.

Each year the Department receives many complaints concerning failed reservations. Most of these complaints involve individuals who have reserved an accessible hotel room only to discover upon arrival that the room they reserved is either not available or not accessible. Although problems with reservations services were not addressed in the ANPRM, commenters independently noted an ongoing problem with hotel reservations and urged the Department to provide regulatory guidance. In response, the Department proposed specific language in the NPRM to address hotel reservations. In addition, the Department posed several questions regarding the current practices of hotels and other reservations services including questions about room guarantees and the holding and release of accessible rooms. The Department also questioned whether public accommodations that provide reservations services for a place or places of lodging but do not own, lease (or lease to), or operate a place of lodging—referred to in this discussion as “third-party reservations services”—should also be subject to the NPRM's proposals concerning hotel reservations.

Although reservations issues were discussed primarily in the context of traditional hotels, the new rule modifies the defi-

nition of “places of lodging” to clarify the scope of the rule's coverage of rental accommodations in timeshare properties, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of public accommodation (as that term is now defined in § 36.104), and the Department received detailed comments, discussed below, regarding the application of reservations requirements to this category of rental accommodations.

General rule on reservations. Section 36.302(e)(1) of the NPRM required a public accommodation that owns, leases (or leases to), or operates a place of lodging to:

Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations, including reservations made by telephone, in-person, or through a third party, for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms.

73 FR 34508, 34553 (June 17, 2008).

Most individual commenters and organizations that represent individuals with disabilities strongly supported the requirement that individuals with disabilities should be able to make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms. In many cases individuals with disabilities expressed frustration because, while they are aware of improvements in architectural access brought about as a result of the ADA, they are unable to take advantage of these improvements because of shortcomings in current hotel reservations systems. A number of these commenters pointed out that it can be difficult or impossible to obtain information about accessible rooms and hotel features and that even when information is provided it often is found to be incorrect upon arrival. They also noted difficulty reserving accessible rooms and the inability to guarantee or otherwise ensure that the appropriate accessible room is available when the guest arrives. The ability to obtain information about accessible guest rooms, to make reservations for accessible guest rooms in the same manner as other guests, and to be assured of an accessible room upon arrival was of critical importance to these commenters.

Other commenters, primarily hotels, resort developers, travel agencies, and organizations commenting on their behalf, did not oppose the general rule on reservations, but recommended that the language requiring that reservations be made “in the same manner” be changed to require that reservations be made “in a substantially similar manner.” These commenters argued that hotel reservations are made in many different ways and through a variety of systems. In

general, they argued that current reservations database systems may not contain sufficient information to permit guests, travel agents, or other third-party reservations services to select the most appropriate room without consulting directly with the hotel, and that updating these systems might be expensive and time consuming. They also noted that in some cases, hotels do not always automatically book accessible rooms when requested to do so. Instead, guests may select from a menu of accessibility and other room options when making reservations. This information is transmitted to the hotel's reservations staff, who then contact the individual to verify the guest's accessibility needs. Only when such verification occurs will the accessible room be booked.

The Department is not persuaded that individuals who need to reserve accessible rooms cannot be served in the same manner as those who do not, and it appears that there are hotels of all types and sizes that already meet this requirement. Further, the Department has been able to accomplish this goal in settlement agreements resolving complaints about this issue. As stated in the preamble to the NPRM, basic nondiscrimination principles mandate that individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The regulation does not require reservations services to create new methods for reserving hotel rooms or available timeshare units; instead, covered entities must make the modifications needed to ensure that individuals who need accessible rooms are able to reserve them in the same manner as other guests. If, for example, hotel reservations are not final until all hotel guests have been contacted by the hotel to discuss the guest's needs, a hotel may follow the same process when reserving accessible rooms. Therefore, the Department declines to change this language, which has been moved to §36.302(e)(1)(i). However, in response to the commenters who recommended a transition period that would allow reservations services time to modify existing reservations systems to meet the requirements of this rule, §36.302(e)(3) now provides a 18-month transition period before the requirements of §36.302(e)(1) will be enforced.

Hotels and organizations commenting on their behalf also requested that the language be changed to eliminate any liability for reservations made through third parties, arguing that they are unable to control the actions of unrelated parties. The rule, both as proposed and as adopted, requires covered public accommodations to ensure that reservations made on their behalf by third parties are made in a manner that results in parity between those who need accessible rooms and those who do not.

Hotels and other places of lodging that use third-party reservations services must make reasonable efforts to make accessible rooms available through at least some of these services and must provide these third-party services with information concerning the accessible features of the hotel and the accessible rooms. To the extent a hotel or other place of lodging makes available such rooms and information to a third-party reservation provider, but the third party fails to provide the information or rooms to people with disabilities in accordance with this section, the hotel or other place of lodging will not be responsible.

Identification of accessible features in hotels and guest rooms. NPRM §36.302(e)(2) required public accommodations that provide hotel reservations services to identify and describe the accessible features in the hotels and guest rooms offered through that service. This requirement is essential to ensure that individuals with disabilities receive the information they need to benefit from the services offered by the place of lodging. As a practical matter, a public accommodation's designation of a guest room as "accessible" will not ensure necessarily that the room complies with all of the 1991 Standards. In older facilities subject to barrier removal requirements, strict compliance with the 1991 Standards is not required. Instead, public accommodations must remove barriers to the extent that it is readily achievable to do so.

Further, hotel rooms that are in full compliance with current standards may differ, and individuals with disabilities must be able to ascertain which features—in new and existing facilities—are included in the hotel's accessible guest rooms. For example, under certain circumstances, an accessible hotel bathroom may meet accessibility requirements with either a bathtub or a roll-in shower. The presence or absence of particular accessible features such as these may be the difference between a room that is usable by a particular person with a disability and one that is not.

Individuals with disabilities strongly supported this requirement. In addition to the importance of information about specific access features, several commenters pointed out the importance of knowing the size and number of beds in a room. Many individuals with disabilities travel with family members, personal care assistants, or other companions and require rooms with at least two beds. Although most hotels provide this information when generally categorizing the type or class of room (e.g., deluxe suite with king bed), as described below, all hotels should consider the size and number of beds to be part of the basic information they are required to provide.

Comments made on behalf of reservations services expressed concern that unless the word "hotels" is stricken from the text,

§ 36.302(e)(2) of the NPRM essentially would require reservations systems to include a full accessibility report on each hotel or resort property in its system. Along these lines, commenters also suggested that the Department identify the specific accessible features of hotel rooms that must be described in the reservations system. For example, commenters suggested limiting features that must be included to bathroom type (tub or roll-in shower) and communications features.

The Department recognizes that a reservations system is not intended to be an accessibility survey. However, specific information concerning accessibility features is essential to travelers with disabilities. Because of the wide variations in the level of accessibility that travelers will encounter, the Department cannot specify what information must be included in every instance. For hotels that were built in compliance with the 1991 Standards, it may be sufficient to specify that the hotel is accessible and, for each accessible room, to describe the general type of room (*e.g.*, deluxe executive suite), the size and number of beds (*e.g.*, two queen beds), the type of accessible bathing facility (*e.g.*, roll-in shower), and communications features available in the room (*e.g.*, alarms and visual notification devices). Based on that information, many individuals with disabilities will be comfortable making reservations.

For older hotels with limited accessibility features, information about the hotel should include, at a minimum, information about accessible entrances to the hotel, the path of travel to guest check-in and other essential services, and the accessible route to the accessible room or rooms. In addition to the room information described above, these hotels should provide information about important features that do not comply with the 1991 Standards. For example, if the door to the “accessible” room or bathroom is narrower than required, this information should be included (*e.g.*, door to guest room measures 30 inches clear). This width may not meet current standards but may be adequate for some wheelchair users who use narrower chairs. In many cases, older hotels provide services through alternatives to barrier removal, for example, by providing check-in or concierge services at a different, accessible location. Reservations services for these entities should include this information and provide a way for guests to contact the appropriate hotel employee for additional information. To recognize that the information and level of detail needed will vary based on the nature and age of the facility, § 36.302(e)(2) has been moved to § 36.302(e)(1)(ii) in the final rule and modified to require reservations services to:

Identify and describe accessible features in the hotels and guest rooms offered through

its reservations service *in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.* [Emphasis added]

As commenters representing hotels have described, once reservations are made, some hotels may wish to contact the guest to offer additional information and services. Or, many individuals with disabilities may wish to contact the hotel or reservations service for more detailed information. At that point, trained staff (including staff located on-site at the hotel and staff located off-site at a reservations center) should be available to provide additional information such as the specific layout of the room and bathroom, shower design, grab-bar locations, and other amenities available (*e.g.*, bathtub bench).

In the NPRM, the Department sought guidance concerning whether this requirement should be applied to third-party reservations services. Comments made by or on behalf of hotels, resort managers, and other members of the lodging and resort industry pointed out that, in most cases, these third parties do not have direct access to this information and must obtain it from the hotel or other place of lodging. Because third-party reservations services must rely on the place of lodging to provide the requisite information and to ensure that it is accurate and timely, the Department has declined to extend this requirement directly to third-party reservations services.

Hold and release of accessible guest rooms. The Department has addressed the hold and release of accessible guest rooms in settlement agreements and recognizes that current practices vary widely. The Department is concerned about current practices by which accessible guest rooms are released to the general public even though the hotel is not sold out. In such instances, individuals with disabilities may be denied an equal opportunity to benefit from the services offered by the public accommodation, *i.e.*, a hotel guest room. In the NPRM, the Department requested information concerning the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities.

Individuals with disabilities and organizations commenting on their behalf strongly supported requiring accessible rooms to be held back for rental by individuals with disabilities. In some cases commenters supported holding back all accessible rooms until all non-accessible rooms were rented. Others supported holding back accessible rooms in each category of rooms until all other rooms of that type were reserved. This latter position was also supported in comments received on behalf of the lodging industry; commenters also noted that this is

the current practice of many hotels. In general, holding accessible rooms until requested by an individual who needs a room with accessible features or until it is the only available room of its type was viewed widely as a sensible approach to allocating scarce accessible rooms without imposing unnecessary costs on hotels.

The Department agrees with this latter approach and has added §36.302(e)(1)(iii), which requires covered entities to hold accessible rooms for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type. For example, if there are 25 rooms of a given type and two of these rooms are accessible, the reservations service is required to rent all 23 non-accessible rooms before it is permitted to rent these two accessible rooms to individuals without disabilities. If a one-of-a-kind room is accessible, that room is available to the first party to request it. The Department believes that this is the fairest approach available since it reserves accessible rooms for individuals who require them until all non-accessible rooms of that type have been reserved, and then provides equal access to any remaining rooms. It is also fair to hotels because it does not require them to forego renting a room that actually has been requested in favor of the possibility that an individual with a disability may want to reserve it at a later date.

Requirement to block accessible guest room reservations. NPRM §36.302(e)(3) required a public accommodation that owns, leases (or leases to), or operates a place of lodging to guarantee accessible guest rooms that are reserved through a reservations service to the same extent that it guarantees rooms that are not accessible. In the NPRM, the Department sought comment on the current practices of hotels and third party reservations services with respect to “guaranteed” hotel reservations and on the impact of requiring a public accommodation to guarantee accessible rooms to the extent it guarantees other rooms.

Comments received by the Department by and on behalf of both individuals with disabilities and public accommodations that provide reservations services made clear that, in many cases, when speaking of room guarantees, parties who are not familiar with hotel terminology actually mean to refer to policies for blocking and holding specific hotel rooms. Several commenters explained that, in most cases, when an individual makes “reservations,” hotels do not reserve specific rooms; rather the individual is reserving a room with certain features at a given price. When the hotel guest arrives, he or she is provided with a room that has those features.

In most cases, this does not pose a problem because there are many available rooms of a

given type. However, in comparison, accessible rooms are much more limited in availability and there may be only one room in a given hotel that meets a guest’s needs. As described in the discussion on the identification of accessible features in hotels and guest rooms, the presence or absence of particular accessible features may be the difference between a room that is usable by a particular person with a disability and one that is not.

For that reason, the Department has added §36.302(e)(1)(iv) to the final rule. Section 36.302(e)(1)(iv) requires covered entities to reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest rooms requested are blocked and removed from all reservations systems (to eliminate double-booking, which is a common problem that arises when rooms are made available to be reserved through more than one reservations service). Of course, if a public accommodation typically requires a payment or deposit from its patrons in order to reserve a room, it may require the same payment or deposit from individuals with disabilities before it reserves an accessible room and removes it from all its reservations systems. These requirements should alleviate the widely-reported problem of arriving at a hotel only to discover that, although an accessible room was reserved, the room available is not accessible or does not have the specific accessible features needed. Many hotels already have a similar process in place for other guest rooms that are unique or one-of-a-kind, such as “Presidential” suites. The Department has declined to extend this requirement directly to third-party reservations services. Comments the Department received in response to the NPRM indicate that most of the actions required to implement these requirements primarily are within the control of the entities that own the place of lodging or that manage it on behalf of its owners.

Guarantees of reservations for accessible guest rooms. The Department recognizes that not all reservations are guaranteed, and the rule does not impose an affirmative duty to guarantee reservations. When a public accommodation does guarantee hotel or other room reservations, it must provide the same guarantee for accessible guest rooms as it makes for other rooms, except that it must apply that guarantee to the specific room reserved and blocked, even if in other situations, its guarantee policy only guarantees that a room of a specific type will be available at the guaranteed price. Without this reasonable modification to its guarantee policy, any guarantee for accessible rooms would be meaningless. If, for example, a hotel makes reservations for an accessible “Executive Suite” but, upon arrival, offers its guest an inaccessible Executive Suite that the guest is unable to enter, it would be meaningless

to consider the hotel's guarantee fulfilled. As with the requirements for identifying, holding, and blocking accessible rooms, the Department has declined to extend this requirement directly to third-party reservations services because the fulfillment of guarantees largely is beyond their power to control.

Application to rental units in timeshare, vacation communities, and condo-hotels. Because the Department has revised the definition of "Places of Lodging" in the final rule, the reservations requirements now apply to guest rooms and other rental units in timeshares, vacation communities, and condo-hotels where some or all of the units are owned and controlled by individual owners and rented out some portion of time to the public, as compared to traditional hotels and motels that are owned, controlled, and rented to the public by one entity. If a reservations service owns and controls one or more of the guest rooms or other units in the rental property (*e.g.*, a developer who retains and rents out unsold inventory), it is subject to the requirements set forth in §36.302(e).

Several commenters expressed concern about any rule that would require accessible units that are owned individually to be removed from the rental pool and rented last. Commenters pointed out that this would be a disadvantage to the owners of accessible units because they would be rented last, if at all. Further, certain vacation property managers consider holding specific units back to be a violation of their ethical responsibility to present all properties they manage at an equal advantage. To address these concerns, the Department has added §36.302(e)(2), which exempts reservations for individual guest rooms and other units that are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility from the requirement that accessible guest rooms be held back from rental until all other guest rooms of that type have been rented. Section 36.302(e)(2) also exempts such rooms from requirements for blocking and guaranteeing reserved rooms. In resort developments with mixed ownership structures, such as a resort where some units are operated as hotel rooms and others are owned and controlled individually, a reservations service operated by the owner of the hotel portion may apply the exemption only to the rooms that are not owned or substantially controlled by the entity that owns, manages, or otherwise controls the overall facility.

Other reservations-related comments made on behalf of these entities reflected concerns similar to the general concerns expressed with respect to traditional hotel properties. For example, commenters noted that because of the unique nature of the timeshare industry, additional flexibility is needed when making reservations for accessible units. One commenter explained that res-

ervations are sometimes made through unusual entities such as exchange companies, which are not public accommodations and which operate to trade ownership interests of millions of individual owners. The commenter expressed concern that developers or resort owners would be held responsible for the actions of these exchange entities. If, as described, the choice to list a unit with an exchange company is made by the individual owner of the property and the exchange company does not operate on behalf of the reservations service, the reservations service is not liable for the exchange company's actions.

As with hotels, the Department believes that within the 18-month transition period these reservations services should be able to modify their systems to ensure that potential guests with disabilities who need accessible rooms can make reservations during the same hours and in the same manner as those who do not need accessible rooms.

Section 36.302(f) Ticketing

The 1991 title III regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public accommodations, however, are subject to title III's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title III's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as provided to spectators purchasing conventional seats. In the NPRM, the Department proposed §36.302(f) to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public accommodations, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for

others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, a *series of events* includes, but is not limited to, subscription events, event packages, season tickets, or any other tickets that may be purchased for multiple events of the same type over the course of a specified period of time whose ownership right reverts to the public accommodation at the end of each season or time period. Series-of-events tickets that give their holders an enhanced ability to purchase such tickets from the public accommodation in seasons or periods of time that follow, such as a right of first refusal or higher ranking on waiting lists for more desirable seats, are subject to the provisions in this section. In addition, the final rule merges together some NPRM paragraphs that dealt with related topics and has reordered and renamed some of the paragraphs that were in the NPRM.

Ticket sales. In the NPRM, the Department proposed, in §36.302(f)(1), a general rule that a public accommodation shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating for an event or series of events in the same way as others (*i.e.*, during the same hours and through the same distribution methods as other seating is sold). “Accessible seating” is defined in §36.302(f)(1)(i) of the final rule to mean “wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (4) of this section.” The defined term does not include designated aisle seats. A “wheelchair space” refers to a space for a single wheelchair and its occupant.

The NPRM proposed requiring that accessible seats be sold through the “same methods of distribution” as non-accessible seats. 73 FR 34508, 34554 (June 17, 2008). Comments from venue managers and others in the business community, in general, noted that multiple parties are involved in ticketing, and because accessible seats may not be allotted to all parties involved at each stage, such parties should be protected from liability. For example, one commenter noted that a third-party ticket vendor, like Ticketmaster, can only sell the tickets it receives from its client. Because §36.302(f)(1) of the final rule requires venue operators to make available accessible seating through the same methods of distribution they use for their regular tickets, venue operators

that provide tickets to third-party ticket vendors are required to provide accessible seating to the third-party ticket vendor. This provision will enhance third-party ticket vendors’ ability to acquire and sell accessible seating for sale in the future. The Department notes that once third-party ticket vendors acquire accessible tickets, they are obligated to sell them in accordance with these rules.

The Department also has received frequent complaints that individuals with disabilities have not been able to purchase accessible seating over the Internet, and instead have had to engage in a laborious process of calling a customer service line, or sending an email to a customer service representative and waiting for a response. Not only is such a process burdensome, but it puts individuals with disabilities at a disadvantage in purchasing tickets for events that are popular and may sell out in minutes. Because §36.302(f)(5) of the final rule authorizes venues to release accessible seating in case of a sell-out, individuals with disabilities effectively could be cut off from buying tickets unless they also have the ability to purchase tickets in real time over the Internet. The Department’s new regulatory language is designed to address this problem.

Several commenters representing assembly areas raised concerns about offering accessible seating for sale over the Internet. They contended that this approach would increase the incidence of fraud since anyone easily could purchase accessible seating over the Internet. They also asserted that it would be difficult technologically to provide accessible seating for sale in real time over the Internet, or that to do so would require simplifying the rules concerning the purchase of multiple additional accompanying seats. Moreover, these commenters argued that requiring an individual purchasing accessible seating to speak with a customer service representative would allow the venue to meet the patron’s needs most appropriately and ensure that wheelchair spaces are reserved for individuals with disabilities who require wheelchair spaces. Finally, these commenters argued that individuals who can transfer effectively and conveniently from a wheelchair to a seat with a movable armrest seat could instead purchase designated aisle seats.

The Department considered these concerns carefully and has decided to continue with the general approach proposed in the NPRM. Although fraud is an important concern, the Department believes that it is best combated by other means that would not have the effect of limiting the ability of individuals with disabilities to purchase tickets, particularly since restricting the purchase of accessible seating over the Internet will, of itself, not curb fraud. In addition, the Department has identified permissible means

for covered entities to reduce the incidence of fraudulent accessible seating ticket purchases in § 36.302(f)(8) of the final rule.

Several commenters questioned whether ticket Web sites themselves must be accessible to individuals who are blind or have low vision, and if so, what that requires. The Department has consistently interpreted the ADA to cover Web sites that are operated by public accommodations and stated that such sites must provide their services in an accessible manner or provide an accessible alternative to the Web site that is available 24 hours a day, seven days a week. The final rule, therefore, does not impose any new obligation in this area. The accessibility of Web sites is discussed in more detail in the section entitled “Other Issues.”

In § 36.302(f)(2) of the NPRM, the Department also proposed requiring public accommodations to make accessible seating available during all stages of tickets sales including, but not limited to, presales, promotions, lotteries, waitlists, and general sales. For example, if tickets will be presold for an event that is open only to members of a fan club, or to holders of a particular credit card, then tickets for accessible seating must be made available for purchase through those means. This requirement does not mean that any individual with a disability would be able to purchase those seats. Rather, it means that an individual with a disability who meets the requirement for such a sale (*e.g.*, who is a member of the fan club or holds that credit card) will be able to participate in the special promotion and purchase accessible seating. The Department has maintained the substantive provisions of the NPRM’s §§ 36.302(f)(1) and (f)(2) but has combined them in a single paragraph at § 36.302(f)(1)(ii) of the final rule so that all of the provisions having to do with the manner in which tickets are sold are located in a single paragraph.

Identification of available accessible seating. In the NPRM, the Department proposed § 36.302(f)(3), which, as modified and renumbered § 36.302(f)(2)(iii) in the final rule, requires a facility to identify available accessible seating through seating maps, brochures, or other methods if that information is made available about other seats sold to the general public. This rule requires public accommodations to provide information about accessible seating to the same degree of specificity that it provides information about general seating. For example, if a seating map displays color-coded blocks pegged to prices for general seating, then accessible seating must be similarly color-coded. Likewise, if covered entities provide detailed maps that show exact seating and pricing for general seating, they must provide the same for accessible seating.

The NPRM did not specify a requirement to identify prices for accessible seating. The

final rule requires that if such information is provided for general seating, it must be provided for accessible seating as well.

In the NPRM, the Department proposed in § 36.302(f)(4) that a public accommodation, upon being asked, must inform persons with disabilities and their companions of the locations of all unsold or otherwise available seating. This provision is intended to prevent the practice of “steering” individuals with disabilities to certain accessible seating so that the facility can maximize potential ticket sales by releasing unsold accessible seating, especially in preferred or desirable locations, for sale to the general public. The Department received no significant comment on this proposal. The Department has retained this provision in the final rule but has added it, with minor modifications, to § 36.302(f)(2) as paragraph (i).

Ticket prices. In the NPRM, the Department proposed § 36.302(f)(7) requiring that ticket prices for accessible seating be set no higher than the prices for other seats in that seating section for that event. The NPRM’s provision also required that accessible seating be made available at every price range, and if an existing facility has barriers to accessible seating within a particular price range, a proportionate amount of seating (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) must be offered in an accessible location at that same price. Under this rule, for example, if it is not readily achievable for a 20,000-seat facility built in 1980 to place accessible seating in the \$20-price category, which is on the upper deck, it must place a proportionate number of seats in an accessible location for \$20. If the upper deck has 2,000 seats, then the facility must place 10 percent of its accessible seating in an accessible location for \$20 provided that it is part of a seating section where ticket prices are equal to or more than \$20—a facility may not place the \$20-accessible seating in a \$10-seating section. The Department received no significant comment on this rule, and it has been retained, as amended, in the final rule in § 36.302(f)(3).

Purchase of multiple tickets. In the NPRM, the Department proposed § 36.302(f)(9) to address one of the most common ticketing complaints raised with the Department: that individuals with disabilities are not able to purchase more than two tickets. The Department proposed this provision to facilitate the ability of individuals with disabilities to attend events with friends, companions, or associates who may or may not have a disability by enabling individuals with disabilities to purchase the maximum number of tickets allowed per transaction to other spectators; by requiring venues to place accompanying individuals in general seating as close as possible to accessible seating (in the event that a group must be divided because

of the large size of the group); and by allowing an individual with a disability to purchase up to three additional contiguous seats per wheelchair space if they are available at the time of sale. Section 36.302(f)(9)(ii) of the NPRM required that a group containing one or more wheelchair users must be placed together, if possible, and that in the event that the group could not be placed together, the individuals with disabilities may not be isolated from the rest of the group.

The Department asked in the NPRM whether this rule was sufficient to effectuate the integration of individuals with disabilities. Many advocates and individuals praised it as a welcome and much-needed change, stating that the trade-off of being able to sit with their family or friends was worth reducing the number of seats available for individuals with disabilities. Some commenters went one step further and suggested that the number of additional accompanying seats should not be restricted to three.

Although most of the substance of the proposed provision on the purchase of multiple tickets has been maintained in the final rule, it has been renumbered as § 36.302(f)(4), reorganized, and supplemented. To preserve the availability of accessible seating for other individuals with disabilities, the Department has not expanded the rule beyond three additional contiguous seats. Section 36.302(f)(4)(i) of the final rule requires public accommodations to make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. The requirement that the additional seats be “contiguous with the wheelchair space” does not mean that each of the additional seats must be in actual contact or have a border in common with the wheelchair space; however, at least one of the additional seats should be immediately adjacent to the wheelchair space. The Department recognizes that it will often be necessary to use vacant wheelchair spaces to provide for contiguous seating.

The Department has added paragraphs (4)(ii) and (4)(iii) to clarify that in situations where there are insufficient unsold seats to provide three additional contiguous seats per wheelchair space or a ticket office restricts sales of tickets to a particular event to less than four tickets per customer, the obligation to make available three additional contiguous seats per wheelchair space would be affected. For example, if at the time of purchase, there are only two additional contiguous seats available for purchase because the third has been sold already, then the ticket purchaser would be entitled to two such seats. In this situation, the public entity would be required to make up the difference by offering one additional ticket for sale that is as close as possible to the accessible

seats. Likewise, if ticket purchases for an event are limited to two per customer, a person who uses a wheelchair who seeks to purchase tickets would be entitled to purchase only one additional contiguous seat for the event.

The Department has also added paragraph (4)(iv) to clarify that the requirement for three additional contiguous seats is not intended to serve as a cap if the maximum number of tickets that may be purchased by members of the general public exceeds the four tickets an individual with a disability ordinarily would be allowed to purchase (*i.e.*, a wheelchair space and three additional contiguous seats). If the maximum number of tickets that may be purchased by members of the general public exceeds four, an individual with a disability is to be allowed to purchase the maximum number of tickets; however, additional tickets purchased by an individual with a disability beyond the wheelchair space and the three additional contiguous seats provided in § 36.302(f)(4)(i) do not have to be contiguous with the wheelchair space.

The NPRM proposed at § 36.302(f)(9)(ii) that for group sales, if a group includes one or more individuals who use a wheelchair, then the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the rest of the members of their group. The final rule retains the NPRM language in paragraph (4)(v).

Hold and release of unsold accessible seating. The Department recognizes that not all accessible seating will be sold in all assembly areas for every event to individuals with disabilities who need such seating and that public accommodations may have opportunities to sell such seating to the general public. The Department proposed in the NPRM a provision aimed at striking a balance between affording individuals with disabilities adequate time to purchase accessible seating and the entity's desire to maximize ticket sales. In the NPRM, the Department proposed § 36.302(f)(6), which allowed for the release of accessible seating under the following circumstances: (i) When all seating in the facility has been sold, excluding luxury boxes, club boxes, or suites; (ii) when all seating in a designated area has been sold and the accessible seating being released is in the same area; or (iii) when all seating in a designated price range has been sold and the accessible seating being released is within the same price range.

The Department's NPRM asked “whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described

above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?" 73 FR 34508, 34527 (June 17, 2008).

The Department received comments both supporting and opposing the inclusion of a hold-and-release provision. One side proposed loosening the restrictions on the release of unsold accessible seating. One commenter from a trade association suggested that tickets should be released regardless of whether there is a sell-out, and that these tickets should be released according to a set schedule. Conversely, numerous individuals, advocacy groups, and at least one public entity urged the Department to tighten the conditions under which unsold tickets for accessible seating may be released. These commenters suggested that venues should not be permitted to release tickets during the first two weeks of sale, or alternatively, that they should not be permitted to be released earlier than 48 hours before a sold-out event. Many of these commenters criticized the release of accessible seating under the second and third prongs of §36.302(f)(6) in the NPRM (when there is a sell-out in general seating in a designated seating area or in a price range), arguing that it would create situations where general seating would be available for purchase while accessible seating would not be.

Numerous commenters—both from the industry and from advocacy groups—asked for clarification of the term "sell-out." Business groups commented that industry practice is to declare a sell-out when there are only "scattered singles" available—isolated seats that cannot be purchased as a set of adjacent pairs. Many of those same commenters also requested that "sell-out" be qualified with the phrase "of all seating available for sale" since it is industry practice to hold back from release tickets to be used for groups connected with that event (*e.g.*, the promoter, home team, or sports league). They argued that those tickets are not available for sale and any return of these tickets to the general inventory happens close to the event date. Noting the practice of holding back tickets, one advocacy group suggested that covered entities be required to hold back accessible seating in proportion to the number of tickets that are held back for later release.

The Department has concluded that it would be inappropriate to interfere with industry practice by defining what constitutes a "sell-out" and that a public accommodation should continue to use its own approach

to defining a "sell-out." If, however, a public accommodation declares a sell-out by reference to those seats that are available for sale, but it holds back tickets that it reasonably anticipates will be released later, it must hold back a proportional percentage of accessible seating to be released as well.

Adopting any of the alternatives proposed in the comments summarized above would have upset the balance between protecting the rights of individuals with disabilities and meeting venues' concerns about lost revenue from unsold accessible seating. As a result, the Department has retained §36.302(f)(6) re-numbered as §36.302(f)(5) in the final rule. The Department has, however, modified the regulation text to specify that accessible seating may be released only when "all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area." As stated in the NPRM, the Department intended for this provision to allow, for example, the release of accessible seating at the orchestra level when all other seating at the orchestra level is sold. The Department has added this language to the final rule at §36.302(f)(5)(B) to clarify that venues cannot designate or redesignate seating areas for the purpose of maximizing the release of unsold accessible seating. So, for example, a venue may not determine on an ad hoc basis that a group of seats at the orchestra level is a designated seating area in order to release unsold accessible seating in that area.

The Department also has maintained the hold-and-release provisions that appeared in the NPRM, but has added a provision to address the release of accessible seating for series-of-events tickets on a series-of-events basis. Many commenters asked the Department whether unsold accessible seating may be converted to general seating and released to the general public on a season-ticket basis or longer when tickets typically are sold as a season-ticket package or other long-term basis. Several disability rights organizations and individual commenters argued that such a practice should not be permitted, and, if it were, that conditions should be imposed to ensure that individuals with disabilities have future access to those seats.

The Department interprets the fundamental principle of the ADA as a requirement to give individuals with disabilities equal, not better, access to those opportunities available to the general public. Thus, for example, a public accommodation that sells out its facility on a season-ticket only basis is not required to leave unsold its accessible seating if no persons with disabilities purchase those season-ticket seats. Of course, public accommodations may choose to go beyond what is required by reserving accessible seating for individuals with disabilities (or

releasing such seats for sale to the general public) on an individual-game basis.

If a covered entity chooses to release unsold accessible seating for sale on a season-ticket or other long-term basis, it must meet at least two conditions. Under §36.302(f)(5)(iii) of the final rule, public accommodations must leave flexibility for game-day change-outs to accommodate ticket transfers on the secondary market. And public accommodations must modify their ticketing policies so that, in future years, individuals with disabilities will have the ability to purchase accessible seating on the same basis as other patrons (*e.g.*, as season tickets). Put differently, releasing accessible seating to the general public on a season-ticket or other long-term basis cannot result in that seating being lost to individuals with disabilities in perpetuity. If, in future years, season tickets become available and persons with disabilities have reached the top of the waiting list or have met any other eligibility criteria for season ticket purchases, public accommodations must ensure that accessible seating will be made available to the eligible individuals. In order to accomplish this, the Department has added §36.302(f)(5)(iii)(A) to require public accommodations that release accessible season tickets to individuals who do not have disabilities that require the features of accessible seating to establish a process to prevent the automatic reassignment of such ticket holders to accessible seating. For example, a public accommodation could have in place a system whereby accessible seating that was released because it was not purchased by individuals with disabilities is not in the pool of tickets available for purchase for the following season unless and until the conditions for ticket release have been satisfied in the following season. Alternatively, a public accommodation might release tickets for accessible seating only when a purchaser who does not need its features agrees that he or she has no guarantee of or right to the same seats in the following season, or that if season tickets are guaranteed for the following season, the purchaser agrees that the offer to purchase tickets is limited to non-accessible seats with, to the extent practicable, comparable price, view, and amenities to the accessible seats such individuals held in the prior year. The Department is aware that this rule may require some administrative changes but believes that this process will not create undue financial and administrative burdens. The Department believes that this approach is balanced and beneficial. It will allow public accommodations to sell all of their seats and will leave open the possibility, in future seasons or series of events, that persons who need accessible seating may have access to it.

The Department also has added §36.302(f)(5)(iii)(B) to address how season

tickets or series-of-events tickets that have attached ownership rights should be handled if the ownership right returns to the public accommodation (*e.g.*, when holders forfeit their ownership right by failing to purchase season tickets or sell their ownership right back to a public accommodation). If the ownership right is for accessible seating, the public accommodation is required to adopt a process that allows an eligible individual with a disability who requires the features of such seating to purchase the rights and tickets for such seating.

Nothing in the regulatory text prevents a public accommodation from establishing a process whereby such ticket holders agree to be voluntarily reassigned from accessible seating to another seating area so that individuals with mobility disabilities or disabilities that require the features of accessible seating and who become newly eligible to purchase season tickets have an opportunity to do so. For example, a public accommodation might seek volunteers to relocate to another location that is at least as good in terms of its location, price, and amenities or a public accommodation might use a seat with forfeited ownership rights as an inducement to get a ticket holder to give up accessible seating he or she does not need.

Ticket transfer. The Department received many comments asking whether accessible seating has the same transfer rights as general seats. The proposed regulation at §36.302(f)(5) required that individuals with disabilities must be allowed to purchase season tickets for accessible seating on the same terms and conditions as individuals purchasing season tickets for general seating, including the right—if it exists for other ticket-holders—to transfer individual tickets to friends or associates. Some commenters pointed out that the NPRM proposed explicitly allowing individuals with disabilities holding season tickets to transfer tickets but did not address the transfer of tickets purchased for individual events. Several commenters representing assembly areas argued that persons with disabilities holding tickets for an individual event should not be allowed to sell or transfer them to third parties because such ticket transfers would increase the risk of fraud or would make unclear the obligation of the entity to accommodate secondary ticket transfers. They argued that individuals holding accessible seating should either be required to transfer their tickets to another individual with a disability or return them to the facility for a refund.

Although the Department is sympathetic to concerns about administrative burden, curtailing transfer rights for accessible seating when other ticket holders are permitted to transfer tickets would be inconsistent with the ADA's guiding principle that individuals with disabilities must have rights

equal to others. Thus, the Department has added language in the final rule in §36.302(f)(6) that requires that individuals with disabilities holding accessible seating for any event have the same transfer rights accorded other ticket holders for that event. Section 36.302(f)(6) also preserves the rights of individuals with disabilities who hold tickets to accessible seats for a series of events to transfer individual tickets to others, regardless of whether the transferee needs accessible seating. This approach recognizes the common practice of individuals splitting season tickets or other multi-event ticket packages with friends, colleagues, or other spectators to make the purchase of season tickets affordable; individuals with disabilities should not be placed in the burdensome position of having to find another individual with a disability with whom to share the package.

This provision, however, does not require public accommodations to seat an individual who holds a ticket to an accessible seat in such seating if the individual does not need the accessible features of the seat. A public accommodation may reserve the right to switch these individuals to different seats if they are available, but a public accommodation is not required to remove a person without a disability who is using accessible seating from that seating, even if a person who uses a wheelchair shows up with a ticket from the secondary market for a non-accessible seat and wants accessible seating.

Secondary ticket market. Section 36.302(f)(7) is a new provision in the final rule that requires a public accommodation to modify its policies, practices, or procedures to ensure that an individual with a disability, who acquires a ticket in the secondary ticket market, may use that ticket under the same terms and conditions as other ticket holders who acquire a ticket in the secondary market for an event or series of events. This principle was discussed in the NPRM in connection with §36.302(f)(5), pertaining to season-ticket sales. There, the Department asked for public comment regarding a public accommodation's proposed obligation to accommodate the transfer of accessible seating tickets on the secondary ticket market to those who do not need accessible seating and vice versa.

The secondary ticket market, for the purposes of this rule, broadly means any transfer of tickets after the public accommodation's initial sale of tickets to individuals or entities. It thus encompasses a wide variety of transactions, from ticket transfers between friends to transfers using commercial exchange systems. Many commenters noted that the distinction between the primary and secondary ticket market has become blurred as a result of agreements between teams, leagues, and secondary market sellers. These commenters noted that the sec-

ondary market may operate independently of the public accommodation, and parts of the secondary market, such as ticket transfers between friends, undoubtedly are outside the direct jurisdiction of the public accommodation. To the extent that venues seat persons who have purchased tickets on the secondary market, they must similarly seat persons with disabilities who have purchased tickets on the secondary market. In addition, some public accommodations may acquire ADA obligations directly by formally entering the secondary ticket market.

The Department's enforcement experience with assembly areas also has revealed that venues regularly provide for and make last-minute seat transfers. As long as there are vacant wheelchair spaces, requiring venues to provide wheelchair spaces for patrons who acquired inaccessible seats and need wheelchair spaces is an example of a reasonable modification of a policy under title III of the ADA. Similarly, a person who has a ticket for a wheelchair space but who does not require its accessible features could be offered non-accessible seating if such seating is available.

The Department's longstanding position that title III of the ADA requires venues to make reasonable modifications in their policies to allow individuals with disabilities who acquired non-accessible tickets on the secondary ticket market to be seated in accessible seating, where such seating is vacant, is supported by the only Federal court to address this issue. *See Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1171 (D. Or. 1998). The Department has incorporated this position into the final rule at §36.302(f)(7)(ii).

The NPRM contained two questions aimed at gauging concern with the Department's consideration of secondary ticket market sales. The first question asked whether a secondary purchaser who does not have a disability and who buys an accessible seat should be required to move if the space is needed for someone with a disability.

Many disability rights advocates answered that the individual should move provided that there is a seat of comparable or better quality available for him and his companion. Some venues, however, expressed concerns about this provision, and asked how they are to identify who should be moved and what obligations apply if there are no seats available that are equivalent or better in quality.

The Department's second question asked whether there are particular concerns about the obligation to provide accessible seating, including a wheelchair space, to an individual with a disability who purchases an inaccessible seat through the secondary market.

Industry commenters contended that this requirement would create a "logistical nightmare," with venues scrambling to

reseat patrons in the short time between the opening of the venues' doors and the commencement of the event. Furthermore, they argued that they might not be able to reseat all individuals and that even if they were able to do so, patrons might be moved to inferior seats (whether in accessible or non-accessible seating). These commenters also were concerned that they would be sued by patrons moved under such circumstances.

These commenters seem to have misconstrued the rule. Covered entities are not required to seat every person who acquires a ticket for inaccessible seating but needs accessible seating, and are not required to move any individual who acquires a ticket for accessible seating but does not need it. Covered entities that allow patrons to buy and sell tickets on the secondary market must make reasonable modifications to their policies to allow persons with disabilities to participate in secondary ticket transfers. The Department believes that there is no one-size-fits-all rule that will suit all assembly areas. In those circumstances where a venue has accessible seating vacant at the time an individual with a disability who needs accessible seating presents his ticket for inaccessible seating at the box office, the venue must allow the individual to exchange his ticket for an accessible seat in a comparable location if such an accessible seat is vacant. Where, however, a venue has sold all of its accessible seating, the venue has no obligation to provide accessible seating to the person with a disability who purchased an inaccessible seat on the secondary market. Venues may encourage individuals with disabilities who hold tickets for inaccessible seating to contact the box office before the event to notify them of their need for accessible seating, even though they may not require ticketholders to provide such notice.

The Department notes that public accommodations are permitted, though not required, to adopt policies regarding moving patrons who do not need the features of an accessible seat. If a public accommodation chooses to do so, it might mitigate administrative concerns by marking tickets for accessible seating as such, and printing on the ticket that individuals who purchase such seats but who do not need accessible seating are subject to being moved to other seats in the facility if the accessible seating is required for an individual with a disability. Such a venue might also develop and publish a ticketing policy to provide transparency to the general public and to put holders of tickets for accessible seating who do not require it on notice that they may be moved.

Prevention of fraud in purchase of accessible seating. Assembly area managers and advocacy groups have informed the Department that the fraudulent purchase of accessible seating is a pressing concern. Curbing fraud is a goal that public accommodations and in-

dividuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities.

In the NPRM, the Department struck a balance between these competing concerns by proposing §36.302(f)(8), which prohibited public accommodations from asking for proof of disability before the purchase of accessible seating but provided guidance in two paragraphs on appropriate measures for curbing fraud. Paragraph (i) proposed allowing a public accommodation to ask individuals purchasing single-event tickets for accessible seating whether they are wheelchair users. Paragraph (ii) proposed allowing a public accommodation to require individuals purchasing accessible seating for season tickets or other multi-event ticket packages to attest in writing that the accessible seating is for a wheelchair user. Additionally, the NPRM proposed to permit venues, when they have good cause to believe that an individual has fraudulently purchased accessible seating, to investigate that individual.

Several commenters objected to this rule on the ground that it would require a wheelchair user to be the purchaser of tickets. The Department has reworded this paragraph to reflect that the individual with a disability does not have to be the ticket purchaser. The final rule allows third parties to purchase accessible tickets at the request of an individual with a disability.

Commenters also argued that other individuals with disabilities who do not use wheelchairs should be permitted to purchase accessible seating. Some individuals with disabilities who do not use wheelchairs urged the Department to change the rule, asserting that they, too, need accessible seating. The Department agrees that such seating, although designed for use by a wheelchair user, may be used by non-wheelchair users, if those persons are persons with a disability who need to use accessible seating because of a mobility disability or because their disability requires the use of the features that accessible seating provides (e.g., individuals who cannot bend their legs because of braces, or individuals who, because of their disability, cannot sit in a straight-back chair).

Some commenters raised concerns that allowing venues to ask questions to determine whether individuals purchasing accessible seating are doing so legitimately would burden individuals with disabilities in the purchase of accessible seating. The Department has retained the substance of this provision in §36.302(f)(8) of the final rule, but emphasizes that such questions should be asked at the initial time of purchase. For example, if the method of purchase is via the Internet, then the question(s) should be answered by

clicking a yes or no box during the transaction. The public accommodation may warn purchasers that accessible seating is for individuals with disabilities and that individuals purchasing such tickets fraudulently are subject to relocation.

One commenter argued that face-to-face contact between the venue and the ticket holder should be required in order to prevent fraud and suggested that individuals who purchase accessible seating should be required to pick up their tickets at the box office and then enter the venue immediately. The Department has declined to adopt that suggestion. It would be discriminatory to require individuals with disabilities to pick up tickets at the box office when other spectators are not required to do so. If the assembly area wishes to make face-to-face contact with accessible seating ticket holders to curb fraud, it may do so through its ushers and other customer service personnel located within the seating area.

Some commenters asked whether it is permissible for assembly areas to have voluntary clubs where individuals with disabilities self-identify to the public accommodation in order to become a member of a club that entitles them to purchase accessible seating reserved for club members or otherwise receive priority in purchasing accessible seating. The Department agrees that such clubs are permissible, provided that a reasonable amount of accessible seating remains available at all prices and dispersed at all locations for individuals with disabilities who are non-members.

Section 36.303 Auxiliary Aids and Services

Section 36.303(a) of the 1991 title III regulation requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with customers, clients, patients, companions, or participants who have disabilities affecting hearing, vision, or speech. The Department notes that §36.303(a) does not require public accommodations to provide assistance to individuals with disabilities that is unrelated to effective communication, although requests for such assistance may be otherwise subject to the reasonable modifications or barrier removal requirements.

The Department has investigated hundreds of complaints alleging that public accom-

modations have failed to provide effective communication, and many of these investigations have resulted in settlement agreements and consent decrees. During the course of these investigations, the Department has determined that public accommodations sometimes misunderstand the scope of their obligations under the statute and the regulation. Section 36.303 in the final rule codifies the Department's longstanding policies in this area, and includes provisions based on technological advances and breakthroughs in the area of auxiliary aids and services that have occurred since the 1991 title III regulation was published.

Video remote interpreting (VRI). Section 36.303(b)(1) sets out examples of auxiliary aids and services. In the NPRM, the Department proposed adding video remote services (hereafter referred to as “video remote interpreting” or “VRI”) and the exchange of written notes among the examples. The Department also proposed amending the provision to reflect technological advances, such as the wide availability of real-time capability in transcription services and captioning.

VRI is defined in the final rule at §36.104 as “an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images as provided in §36.303(f).” The Department notes that VRI generally consists of a videophone, monitors, cameras, a high-speed video connection, and an interpreter provided by the public accommodation pursuant to a contract for services. The term's inclusion within the definition of “qualified interpreter” makes clear that a public accommodation's use of VRI satisfies its title III obligations only where VRI affords effective communication. Comments from advocates and persons with disabilities expressed concern that VRI may not always provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who cannot see the screen because the signal is interrupted, causing unnatural pauses in communication, or the image is grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI, and some recommended requirements for equipment maintenance, dedicated high-speed, wide-bandwidth video connections, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's

face, head, arms, hands, and eyes in all transmissions.

The Department has determined that VRI can be an effective method of providing interpreting service in certain situations, particularly when a live interpreter cannot be immediately on the scene. To ensure that VRI is effective, the Department has established performance standards for VRI in §36.303(f). The Department recognizes that reliance on VRI may not be effective in certain situations, such as those involving the exchange of complex information or involving multiple parties, and for some individuals, such as for persons who are deaf-blind, and using VRI in those circumstances would not satisfy a public accommodation's obligation to provide effective communication.

Comments from several disability advocacy organizations and individuals discouraged the Department from adding the exchange of written notes to the list of available auxiliary aids in §36.303(b). The Department consistently has recognized that the exchange of written notes may provide effective communication in certain contexts. The NPRM proposed adding an explicit reference to written notes because some title III entities do not understand that exchange of written notes using paper and pencil may be an available option in some circumstances. Advocates and persons with disabilities requested explicit limits on the use of written notes as a form of auxiliary aid because, they argued, most exchanges are not simple, and handwritten notes do not afford effective communication. One major advocacy organization, for example, noted that the speed at which individuals communicate orally or use sign language averages about 200 words per minute or more, and thus, the exchange of notes may provide only truncated or incomplete communication. For persons whose primary language is American Sign Language (ASL), some commenters pointed out, using written English in exchange of notes often is ineffective because ASL syntax and vocabulary is dissimilar from English. By contrast, some commenters from professional medical associations sought more specific guidance on when notes are allowed, especially in the context of medical offices and health care situations.

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, when blood is drawn for routine lab tests or regular allergy shots are administered. However, interpreters should be used when the matter involves more complexity, such as in communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or in communication of instructions for care at home or elsewhere. The Department discussed in the NPRM the kinds of situations in which use of interpreters or captioning is necessary. Addi-

tional guidance on this issue can be found in a number of agreements entered into with health care providers and hospitals that are available on the Department's Web site at <http://www.ada.gov>.

In addition, commenters requested that the Department include "real-time" before any mention of "computer-aided" or "captioning" technology to highlight the value of simultaneous translation of any communication. The Department has added to the final rule appropriate references to "real-time" to recognize this aspect of effective communication. Lastly, in this provision and elsewhere in the title III regulation, the Department has replaced the term "telecommunications devices for deaf persons (TDD)" with "text telephones (TTYs)." As noted in the NPRM, TTY has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Comments from advocates and persons with disabilities expressed approval of the substitution of TTY for TDD in the proposed regulation, but expressed the view that the Department should expand the definition to "voice, text, and video-based telecommunications products and systems, including TTY's, videophones, and captioned telephones, or equally effective telecommunications systems." The Department has expanded its definition of "auxiliary aids and services" in §36.303 to include those examples in the final rule. Other additions proposed in the NPRM, and retained in the final rule, include Brailled materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology.

As the Department noted in the preamble to the NPRM, the list of auxiliary aids in §36.303(b) is merely illustrative. The Department does not intend that every public accommodation covered by title III must have access to every device or all new technology at all times, as long as the communication provided is effective.

Companions who are individuals with disabilities. The Department has added several new provisions to §36.303(c), but these provisions do not impose new obligations on places of public accommodation. Rather, these provisions simply codify the Department's longstanding positions. Section 36.303(c)(1) now states that "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities." Section 36.303(c)(1)(i) defines "companion" as "a family member, friend, or associate of an individual seeking access to, or participating in,

the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.”

This provision makes clear that if the companion is someone with whom the public accommodation normally would or should communicate, then the public accommodation must provide appropriate auxiliary aids and services to that companion to ensure effective communication with the companion. This commonsense rule provides the necessary guidance to public accommodations to implement properly the nondiscrimination requirements of the ADA. Commenters also questioned why, in the NPRM, the Department defined companion as “a family member, friend, or associate of a program participant * * *,” noting that the scope of a public accommodation’s obligation is not limited to “program participants” but rather includes all individuals seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation. 73 FR 34508, 34554 (June 17, 2008). The Department agrees and has amended the regulatory language accordingly. Many commenters supported inclusion of companions in the rule and requested that the Department clarify that a companion with a disability may be entitled to effective communication from the public accommodation, even though the individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation is not an individual with a disability. Some commenters asked the Department to make clear that if the individual seeking access to or participating in the public accommodation’s program or services is an individual with a disability and the companion is not, the public accommodation may not limit its communication to the companion, instead of communicating directly with the individual with a disability, when it would otherwise be appropriate to communicate with the individual with the disability.

Most entities and individuals from the medical field objected to the Department’s proposal, suggesting that medical and health care providers, and they alone, should determine to whom medical information should be communicated and when auxiliary aids and services should be provided to companions. Others asked that the Department limit the public accommodation’s obligation to communicate effectively with a companion to situations where such communication is necessary to serve the interests of the person who is receiving the public accommodation’s services. It also was suggested that companions should receive auxiliary aids and services only when necessary to en-

sure effective communication with the person receiving the public accommodation’s services, with an emphasis on the particular needs of the patient requiring assistance, not the patient’s family or guardian.

Some in the medical community objected to the inclusion of any regulatory language regarding companions, asserting that such language is overbroad, seeks services for individuals whose presence is neither required by the public accommodation nor necessary for the delivery of the services or good, places additional burdens on the medical community, and represents an uncompensated mandate. One medical association commenter stated that such a mandate was particularly burdensome in situations where a patient is fully and legally capable of participating in the decision-making process and needs little or no assistance in obtaining care and following through on physician’s instructions.

The final rule codifies the Department’s longstanding interpretation of the ADA, and clarifies that public accommodations have effective communication obligations with respect to companions who are individuals with disabilities even where the individual seeking to participate in or benefit from what a public accommodation offers does not have a disability. There are many instances in which such an individual may not be an individual with a disability but his or her companion is an individual with a disability. The effective communication requirement applies equally to that companion.

Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient’s next of kin or health care surrogate with whom hospital personnel need to communicate concerning the patient’s medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient’s symptoms, needs, condition, or medical history. Furthermore, the companion could be a family member with whom hospital personnel normally would communicate. It has been the Department’s longstanding position that public accommodations are required to provide effective communication to companions when they accompany patients to medical care providers for treatment.

The individual with a disability does not need to be present physically to trigger the public accommodation's obligation to provide effective communication to a companion. The controlling principle regarding whether appropriate auxiliary aids and services should be provided is whether the companion is an appropriate person with whom the public accommodation should communicate. Examples of such situations include back-to-school night or parent-teacher conferences at a private school. If the faculty writes on the board or otherwise displays information in a visual context during back-to-school night, this information must be communicated effectively to parents or guardians who are blind or have low vision. At a parent-teacher conference, deaf parents or guardians are to be provided with appropriate auxiliary aids and service to communicate effectively with the teacher and administrators. Likewise, when a deaf spouse attempts to communicate with private social service agencies about the services necessary for the hearing spouse, appropriate auxiliary aids and services must be provided to the deaf spouse by the public accommodation to ensure effective communication.

One medical association sought approval to impose a charge against an individual with a disability, either the patient or the companion, where that person had stated he or she needed an interpreter for a scheduled appointment, the medical provider had arranged for an interpreter to appear, and then the individual requiring the interpreter did not show up for the scheduled appointment. Section 36.301(c) of the 1991 title III regulation prohibits the imposition of surcharges to cover the costs of necessary auxiliary aids and services. As such, medical providers cannot pass along to their patients with disabilities the cost of obtaining an interpreter, even in situations where the individual cancels his or her appointment at the last minute or is a "no-show" for the scheduled appointment. The medical provider, however, may charge for the missed appointment if all other patients are subject to such a charge in the same circumstances.

Determining appropriate auxiliary aids. The type of auxiliary aid the public accommodation provides is dependent on which auxiliary aid is appropriate under the particular circumstances. Section 36.303(c)(1)(ii) codifies the Department's longstanding interpretation that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. As the Department explained in the NPRM, this provision lists factors the public accommodation should consider in determining which type of auxiliary aids and services are nec-

essary. For example, an individual with a disability who is deaf or hard of hearing may need a qualified interpreter to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (*e.g.*, dosage, side effects, drug interactions, etc.). In comparison, an individual who is deaf or hard of hearing who purchases an item in the hospital gift shop may need only an exchange of written notes to achieve effective communication.

The language in the first sentence of §36.303(c)(1)(ii) is derived from the Department's Technical Assistance Manual. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, III-4.3200, available at <http://www.ada.gov/taman3.html>. There were few comments regarding inclusion of this policy in the regulation itself, and those received were positive.

Many advocacy groups, particularly those representing blind individuals and those with low vision, urged the Department to add language in the final rule requiring the provision of accessible material in a manner that is timely, accurate, and private. This, they argued, would be especially important with regard to billing information, other time-sensitive material, or confidential information. The Department has added a provision in §36.303(c)(1)(ii) stating that in "order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way so as to protect the privacy and independence of the individual with a disability."

The second sentence of §36.303(c)(1)(ii) states that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." Many commenters urged the Department to amend this provision to require public accommodations to give primary consideration to the expressed choice of an individual with a disability. However, as the Department explained when it initially promulgated the 1991 title III regulation, the Department believes that Congress did not intend under title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability. *See* 28 CFR part 36, app. B at 726 (2009). The legislative history does, however, demonstrate congressional intent to strongly encourage consulting with persons with disabilities. *Id.* As the Department explained in the 1991 preamble, "the House Education and Labor Committee stated that it 'expects' that 'public accommodation(s) will consult with the

individual with a disability before providing a particular auxiliary aid or service.’ (Education and Labor report at 107).” *Id.*

The commenters who urged that primary consideration be given to the individual with a disability noted, for example, that a public accommodation would not provide effective communication by using written notes where the individual requiring an auxiliary aid is in severe pain, or by providing a qualified ASL interpreter when an individual needs an oral interpreter instead. Both examples illustrate the importance of consulting with the individual with a disability in order to ensure that the communication provided is effective. When a public accommodation ignores the communication needs of the individual requiring an auxiliary aid or service, it does so at its peril, for if the communication provided is not effective, the public accommodation will have violated title III of the ADA.

Consequently, the regulation strongly encourages the public accommodation to engage in a dialogue with the individual with a disability to determine what auxiliary aids and services are appropriate under the circumstances. This dialogue should include a communication assessment of the individual with a disability initially, regularly, and as needed, because the auxiliary aids and services necessary to provide effective communication to the individual may fluctuate. For example, a deaf individual may go to a private community health center with what is at first believed to be a minor medical emergency, such as a sore knee, and the individual with a disability and the community health center both may believe that exchanging written notes will be effective; however, during that individual’s visit, it may be determined that the individual is, in fact, suffering from an anterior cruciate ligament tear and must have surgery to repair the torn ligament. As the situation develops and the diagnosis and recommended course of action evolve into surgery, an interpreter likely will be necessary. The community health center has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication.

Similarly, the Department strongly encourages public accommodations to keep individuals with disabilities apprised of the status of the expected arrival of an interpreter or the delivery of other requested or anticipated auxiliary aids and services. Also, when the public accommodation decides not to provide the auxiliary aids and services requested by an individual with a disability, the public accommodation should provide that individual with the reason for its decision.

Family members and friends as interpreters. Section 36.303(c)(2), which was proposed in the NPRM, has been included in the final rule to make clear that a public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her. The Department has added this regulatory requirement to emphasize that when a public accommodation is interacting with a person with a disability, it is the public accommodation’s responsibility to provide an interpreter to ensure effective communication. It is not appropriate to require the person with a disability to bring another individual to provide such services.

Many commenters supported inclusion of this language in the new rule. A representative from a cruise line association opined, however, that if a guest chose to cruise without an interpreter or companion, the ship would not be compelled to provide an interpreter for the medical facility. On the contrary, when an individual with a disability goes on a cruise, the cruise ship has an obligation to provide effective communication, including, if necessary, a qualified interpreter as defined in the rule.

Some representatives of pediatricians objected to this provision, stating that parents of children with disabilities often know best how to interpret their children’s needs and health status and relay that information to the child’s physician, and to remove that parent, or add a stranger into the examining room, may frighten children. These commenters requested clarification in the regulation that public accommodations should permit parents, guardians, or caregivers of children with disabilities to accompany them in medical settings to ensure effective communication. The regulation does not prohibit parents, guardians, or caregivers from being present or providing effective communication for children. Rather, it prohibits medical professionals (and other public accommodations) from requiring or forcing individuals with disabilities to bring other individuals with them to facilitate communication so that the public accommodation will not have to provide appropriate auxiliary aids and services. The public accommodation cannot avoid its obligation to provide an interpreter except under the circumstances described in §36.303(c)(3)–(4).

A State medical association also objected to this provision, opining that medical providers should have the authority to ask patients to bring someone with them to provide interpreting services if the medical provider determines that such a practice would result in effective communication and that patient privacy and confidentiality would be maintained. While the public accommodation has the obligation to determine what type of auxiliary aids and services are necessary to ensure effective communication, it

cannot unilaterally determine whether the patient's privacy and confidentiality would be maintained.

Section 36.303(c)(3) of the final rule codifies the Department's position that there are certain limited instances when a public accommodation may rely on an accompanying adult to interpret or facilitate communication: (1) In an emergency involving an imminent threat to the safety or welfare of an individual or the public; or (2) if the individual with a disability specifically requests it, the accompanying adult agrees to provide the assistance, and reliance on that adult for this assistance is appropriate under the circumstances. In such instances, the public accommodation should first offer to provide appropriate auxiliary aids and services free of charge.

Commenters requested that the Department make clear that the public accommodation cannot request, rely on, or coerce an accompanying adult to provide effective communication for an individual with a disability, and that only a voluntary offer of assistance is acceptable. The Department states unequivocally that consent of, and for, the accompanying adult to facilitate communication must be provided freely and voluntarily both by the individual with a disability and the accompanying adult—absent an emergency involving an imminent threat to the safety or welfare of an individual or the public. The public accommodation cannot coerce or attempt to persuade another adult to provide effective communication for the individual with a disability.

Several commenters asked that the Department make clear that children are not to be used to provide effective communication for family members and friends and that it is the responsibility of the public accommodation to provide effective communication, stating that interpreters often are needed in settings where it would not be appropriate for children to be interpreting, such as those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material. Children often are hesitant to decline requests to provide communication services, which puts them in a very difficult position vis-a-vis family members and friends. The Department agrees. It is the Department's position that a public accommodation shall not rely on a minor child to facilitate communication with a family member, friend, or other individual except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where no interpreter is available. Accordingly, the Department has revised the rule to state that “[a] public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the

public where there is no interpreter available.” §36.303(c)(4). Sections 36.303(c)(3) and (c)(4) have no application in circumstances where an interpreter would not otherwise be required in order to provide effective communication (*e.g.*, in simple transactions such as purchasing movie tickets at a theater).

The Department stresses that privacy and confidentiality must be maintained but notes that covered entities, such as hospitals, that are subject to the Privacy Rules, 45 CFR parts 160 and 164, of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. *See* 45 CFR parts 160 and 164. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures may be made to such persons.

With regard to emergency situations, proposed §36.303(c)(3) permitted reliance on an individual accompanying an individual with a disability to interpret or facilitate communication in an emergency involving a threat to the safety or welfare of an individual or the public. Commenters requested that the Department make clear that often a public accommodation can obtain appropriate auxiliary aids and services in advance of an emergency, particularly in anticipated emergencies, such as predicted dangerous weather, or in certain medical situations, such as pending childbirth, by making necessary prearrangements. These commenters did not want public accommodations to be relieved of their responsibilities to provide effective communication in emergency situations, noting that the need for effective communication in emergencies is heightened. For the same reason, several commenters requested a separate rule that requires public accommodations to provide timely and effective communication in the event of an emergency.

One group of commenters asked that the Department narrow the regulation permitting reliance on a companion to interpret or facilitate communication in emergency situations so that it is not available to entities with responsibilities for emergency preparedness and response. Some commenters noted that certain exigent circumstances, such as those that exist during and, perhaps, immediately after a major hurricane, temporarily may excuse public accommodations of their responsibilities to provide effective communication. However, they asked that the Department clarify that these obligations are ongoing, and that as soon as such situations begin to abate or become stabilized, the public accommodation must provide effective communication.

The Department recognizes the need for effective communication is critical in emergency situations. After due consideration of all of these concerns raised by commenters, the Department has revised §36.303(c) to narrow the exception permitting reliance on individuals accompanying the individual with a disability during an emergency to make it clear that it applies only to emergencies involving an “imminent threat to the safety or welfare of an individual or the public * * *.” §36.303(c)(3)–(4). The Department wishes to emphasize, however, that application of this exception is narrowly tailored to emergencies involving an imminent threat to the safety or welfare of individuals or the public. Arguably, all visits to an emergency room are by definition emergencies. Likewise, an argument can be made that most situations to which emergency workers respond involve, in one way or another, a threat to the safety or welfare of an individual or the public. The imminent threat exception in §36.303(c)(3)–(4) is not intended to apply to typical and foreseeable emergency situations that are part of the normal operations of these institutions. As such, a public accommodation may rely on an accompanying individual to interpret or facilitate communication under the §36.303(c)(3)–(4) imminent threat exception only where there is a true emergency, *i.e.*, where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

Telecommunications. In addition to the changes discussed in §36.303(b) regarding telecommunications, telephones, and text telephones, the Department has adopted provisions in §36.303(d) of the final rule (which also were included in the NPRM) requiring that public accommodations must not disconnect or refuse to take calls from FCC-approved telecommunications relay systems, including Internet-based relay systems. Commenters from some State agencies, many advocacy organizations, and individuals strongly urged the Department to mandate such action because of the high proportion of TTY calls and relay service calls to title III entities that are not completed because of phone systems or employees not taking the calls. This refusal presents a significant obstacle for persons using TTYs who do business with public accommodations and denies persons with disabilities telephone access for business that typically is handled over the telephone.

Section 36.303(d)(1)(ii) of the NPRM added public telephones equipped with volume control mechanisms and hearing aid-compatible telephones to the examples of types of telephone equipment to be provided. Commenters from the disability community and from telecommunications relay service providers argued that requirements for these particular features on telephones are obso-

lete not only because the deaf and hard of hearing community uses video technology more frequently than other types of telecommunication, but also because all public coin phones have been hearing aid compatible since 1983, pursuant to the Telecommunications for the Disabled Act of 1982, 47 U.S.C. 610. The Hearing Aid Compatibility Act of 1988, 47 U.S.C. 610, extended this requirement to all wireline telephones imported into or manufactured in the United States since 1989. In 1997, the FCC further required that all such phones also be equipped with volume control. *See* 47 CFR 68.6. Given these existing statutory obligations, the proposed language is unnecessary. Accordingly, the Department has deleted that language from the final rule.

The Department understands that there are many new devices and advances in technology that should be included in the definition of available auxiliary aids and is including many of the telecommunications devices and some new technology. While much of this technology is not expensive and should be available to most title III entities, there may be legitimate reasons why in a particular situation some of these new and developing auxiliary aids may not be available, may be prohibitively costly (thus supporting an undue burden defense), or may otherwise not be suitable given other circumstances related to the particular terrain, situation, or functionality in specialized areas where security, among other things, may be a factor limiting the appropriateness of the use of a particular technology or device. The Department recognizes that the available new technology may provide more effective communication than existing technology and that providing effective communication often will include use of new technology and video relay services, as well as interpreters. However, the Department has not mandated that title III entities make all technology or services available upon demand in all situations. When a public accommodation provides the opportunity to make outgoing phone calls on more than an incidental-convenience basis, it shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.

Video remote interpreting (VRI) services. In §36.303(f) of the NPRM, the Department proposed the inclusion of four performance standards for VRI (which the NPRM termed video interpreting services (VIS)), for effective communication: (1) High-quality, clear, real-time, full-motion video, and audio over a dedicated high-speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participants’ heads, arms, hands, and fingers, regardless of their body position; (3) clear transmission of voices; and (4) persons who are trained to set

up and operate the VIS quickly and efficiently.

Commenters generally approved of these proposed performance standards, but recommended that some additional standards be included in the final rule. For persons who are deaf with limited vision, commenters requested that the Department include an explicit requirement that interpreters wear high-contrast clothing with no patterns that might distract from their hands as they are interpreting, so that a person with limited vision could still see the signs made by the interpreter. While the Department reiterates the importance of such practices in the delivery of effective VRI as well as in-person interpreting, the Department declines to adopt such performance standards as part of this rule. In general, professional interpreters already follow such practices, as the Code of Professional Conduct for interpreters developed by the Registry of Interpreter for the Deaf and the National Association of the Deaf incorporates attire considerations into their standards of professionalism and conduct. Moreover, as a result of this code, many VRI agencies have adopted detailed dress standards that interpreters hired by the agency must follow. Commenters also urged explicit requirement of a clear image of the face and eyes of the interpreter and others. Because the face includes the eyes, the Department has amended §36.303(f)(2) of the final rule to include a requirement that the interpreter's face be displayed. Other commenters requested requirement of a wide-bandwidth video connection for the VRI system, and the Department has included this requirement in §36.303(f)(1) of the final rule.

ATMs. The 2010 Standards set out detailed requirements for ATMs, including communication-related requirements to make ATMs usable by individuals who are blind or have low vision. In the NPRM, the Department discussed the application of a safe harbor to the communication-related elements of ATMs. The NPRM explained that the Department considers the communication-related elements of ATMs to be auxiliary aids and services, to which the safe harbor for elements built in compliance with the 1991 standards does not apply.

The Department received several comments regarding this issue. Several commenters representing banks objected to the exclusion of communication-related aspects of ATMs from the safe harbor provision. They explained that the useful life of ATMs—on average 10 years—was longer than the Department noted; thus, without the safe harbor, banks would be forced to retrofit many ATMs in order to comply with the proposed regulation. Such retrofitting, they noted, would be costly to the industry. A few representatives of the disability community commented that communication-related as-

pects of ATMs should be excluded from the safe harbor.

The Department consistently has taken the position that the communication-related elements of ATMs are auxiliary aids and services, rather than structural elements. See 28 CFR part 36, app. B at 728 (2009). Thus, the safe harbor provision does not apply to these elements. The Department believes that the limitations on the effective communication requirements, which provide that a covered entity does not have to take measures that would result in a fundamental alteration of its program or would cause undue burdens, provide adequate protection to covered entities that operate ATMs.

Captioning at sporting venues. In §36.303(g) of the NPRM, the Department proposed that sports stadiums that have a capacity of 25,000 or more shall provide captioning for safety and emergency information on scoreboards and video monitors. In addition, the Department posed four questions about captioning of information, especially safety and emergency information announcements, provided over public address (PA) systems. The Department received many detailed and divergent responses to each of the four questions and the proposed regulatory text. Because comments submitted on the Department's title II and title III proposals were intertwined, because of the similarity of issues involved for title II entities and title III entities, and in recognition of the fact that many large sports stadiums are covered by both title II and title III as joint operations of State or local government and one or more public accommodations, the Department presents here a single consolidated review and summary of the issues raised in comments.

The Department asked whether requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 would create an undue burden for smaller entities, and whether it would be feasible for small stadiums to provide such captioning, or whether a larger threshold, such as sports stadiums with a capacity of 50,000 or more, would be appropriate.

There was a consensus among the commenters, including disability advocates as well as venue owners and stadium designers and operators, that using the stadium size or seating capacity should not be the exclusive deciding factor for any obligation to provide captioning for safety and emergency information broadcast over the PA system. Most disability advocacy organizations and individuals with disabilities complained that using size or seating capacity as a threshold for captioning safety and emergency information would undermine the "undue burden" defense found in both titles II and III. Many commenters provided examples of facilities such as professional hockey arenas

that seat less than 25,000 fans but that, commenters argued, should be able to provide real-time captioning. Other commenters suggested that some high school or college stadiums, for example, may hold 25,000 fans or more and yet lack the resources to provide real-time captioning. Many commenters noted that real-time captioning would require use of trained stenographers, and that most high school and college sports facilities rely upon volunteers to operate scoreboards and PA systems and they would not be qualified stenographers, especially in case of an emergency. One national association noted that the typical stenographer expense for a professional football game in Washington, DC, is about \$550 per game. Similarly, one trade association representing venues estimated that the cost for a professional stenographer at a sporting event runs between \$500 and \$1,000 per game or event, the cost of which, they argued, would be unduly burdensome in many cases. Some commenters posited that schools that do not sell tickets to athletic events would be challenged to meet such expenses, in contrast to major college athletic programs and professional sports teams, which would be less likely to prevail using an “undue burden” defense.

Some venue owners and operators and other covered entities also argued that stadium size should not be the key consideration for whether scoreboard captioning will be required. Instead, these entities suggested that equipment already installed in the stadium, including necessary electrical equipment and backup power supply, should be the determining factor for whether captioning is mandated. Many commenters argued that the requirement to provide captioning should apply only to stadiums with scoreboards that meet the National Fire Protection Association (NFPA) National Fire Alarm Code. Commenters reported that NFPA 72 requires at least two independent and reliable power supplies for emergency information systems, including one source that is a generator or a battery sufficient to run the system in the event the primary power fails. Alternatively, some stadium designers and title II entities commented that the requirement should arise when the facility has at least one elevator providing firefighter emergency operation, along with approval of authorities with responsibility for fire safety. An organization concerned with fire safety codes commented that the Department lacks the expertise to regulate on this topic. Other commenters argued for flexibility in the requirements for providing captioning and contended that any requirement should apply only to stadiums constructed after the effective date of the regulation.

In the NPRM, the Department also asked whether the rule should address the specific means of captioning equipment, whether

captioning should be provided through any effective means (*e.g.*, scoreboards, line boards, handheld devices, or other means), or whether some means, such as handheld devices, should be eliminated as options. This question elicited many comments from advocates for persons with disabilities as well as from covered entities. Advocacy organizations and individuals with experience using handheld devices argued that such devices do not provide effective communication. These commenters noted that information is often delayed in the transmission to such devices, making them hard to use when following action on the playing field or in the event of an emergency when the crowd is already reacting to aural information provided over the PA system well before it is received on the handheld device.

Several venue owners and operators and others commented that handheld technology offers advantages of flexibility and portability so that it may be used successfully regardless of where in the facility the user is located, even when not in the line of sight of a scoreboard or other captioning system. Still other commenters urged the Department not to regulate in such a way as to limit innovation and use of such technology now and in the future. Cost considerations were included in comments from some stadium designers and venue owners and operators who reported that the cost of providing handheld systems is far less than the cost of providing real-time captioning on scoreboards, especially in facilities that do not currently have the capacity to provide real-time captions on existing equipment. Others noted that handheld technology is not covered by fire and safety model codes, including the NFPA, and thus would be more easily adapted into existing facilities if captioning were required by the Department.

The Department also asked about requiring open captioning of all public address announcements, rather than limiting the captioning requirement to safety and emergency information. A variety of advocates and persons with disabilities argued that all information broadcast over a PA system should be captioned in real time at all facilities in order to provide effective communication, and that a requirement only to provide emergency and safety information would not be sufficient. A few organizations representing persons with disabilities commented that installation of new systems should not be required, but that all systems within existing facilities that are capable of providing captioning should provide captioning of information to the maximum extent possible. Several organizations for persons with disabilities commented that all facilities should include in their safety planning measures a requirement that all aurally provided information for patrons with communication disabilities be captioned. Some

advocates suggested that demand for captions will only increase as the number of deaf and hard of hearing persons grows with the aging of the general population and with increasing numbers of veterans returning from war with disabilities. Multiple commenters noted that the captioning would benefit others as well as those with communication disabilities.

By contrast, venue owners and operators and others commented that the action on the sports field is self-explanatory and does not require captioning. These commenters objected to an explicit requirement to provide real-time captioning for all information broadcast on the PA system at a sporting event. Other commenters objected to requiring captioning even for emergency and safety information over the scoreboard rather than through some other means. By contrast, venue operators, State government agencies, and some model code groups, including the NFPA, commented that emergency and safety information must be provided in an accessible format and that public safety is a paramount concern. Other commenters argued that the best method to deliver safety and emergency information would be television monitors showing local TV broadcasts with captions already mandated by the FCC. Some commenters posited that the most reliable information about a major emergency would be provided on the television news broadcasts. They argued that television monitors may be located throughout the facility, improving line of sight for patrons, some of whom might not be able to see the scoreboard from their seats or elsewhere in the facility. Some stadium designers, venue operators, and model code groups pointed out that video monitors are not regulated by the NFPA or other agencies, so that such monitors could be more easily provided. Video monitors may receive transmissions from within the facility and could provide real-time captions if there is the necessary software and equipment to feed the captioning signal to a closed video network within the facility. Several commenters suggested that using monitors would be preferable to requiring captions on the scoreboard if the regulation mandates real-time captioning. Some venue owners and operators argued that retrofitting existing stadiums with new systems could easily cost in the hundreds of thousands of dollars per scoreboard or system. Some stadium designers and others argued that captioning should be required only in stadiums built after the effective date of the regulation. For stadiums with existing systems that allow for real-time captioning, one commenter posited that dedicating the system exclusively to real-time captioning would lead to an annual loss of between two and three million dollars per stadium in revenue from advertising currently running in that space.

After carefully considering the wide range of public comments on this issue, the Department has concluded that the final rule will not provide additional requirements for effective communication or emergency information provided at sports stadiums at this time. The 1991 title II and title III regulations and statutory requirements are not in any way affected by this decision. The decision to postpone rulemaking on this complex issue is based on a number of factors, including the multiple layers of existing regulations by various agencies and levels of government, and the wide array of information, requests, and recommendations related to developing technology offered by the public. The diversity of existing information and communication systems and other characteristics among sports stadiums also complicates the regulation of captioning. The Department has concluded that further consideration and review is prudent before it issues specific regulatory requirements.

Movie captioning. In the NPRM, the Department stated that options were being considered to require movie theater owners and operators to exhibit movies that are captioned for patrons who are deaf or hard of hearing. Captioning makes films accessible to individuals whose hearing is too limited to benefit from assistive listening devices. Both open and closed captioning are examples of auxiliary aids and services required under the Department's 1991 title III regulation. See 28 CFR 36.303(b)(1). Open captions are similar to subtitles in that the text is visible to everyone in the theater, while closed captioning displays the written text of the audio only to those individuals who request it.

In the NPRM, the Department also stated that options were being considered to require movie theater owners and operators to exhibit movies with video description,³ a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken interpretation of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. The descriptions are narrated and recorded onto an audiotape or disk that can be synchronized with the film as it is projected. An audio recording is an example of an auxiliary aid and service required under the Department's 1991 title III regulation. See 28 CFR 36.303(b)(2).

The NPRM stated that technological advances since the early 1990s have made open

³In the NPRM, the Department referred to this technology as "narrative description." 73 FR 34508, 34531 (June 17, 2008). Several commenters informed the Department that the more accurate and commonly understood term is "video description," even though the subject is movies, not video, and so the Department decided to employ that term.

and closed captioning and video description for movies more readily available and effective and noted that the Department was considering options to require captioning and video description for movies exhibited by public accommodations. The NPRM also noted that the Department is aware that the movie industry is transitioning, in whole or in part, to movies in digital format and that movie theater owners and operators are beginning to purchase digital projectors. The Department noted in the NPRM that movie theater owners and operators with digital projectors may have available to them different capabilities than those without digital projectors. The Department sought comment regarding whether and how to require captioning and video description while the film industry makes this transition. In addition, the NPRM stated the Department's concern about the potential cost to exhibit captioned movies, noting that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used, and stated that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a). The Department further noted that it understands the cost of video description equipment to be less than that for closed captioning. The Department then stated that it was considering the possibility of requiring public accommodations to exhibit all new movies in captioned format and with video description at every showing. The NPRM stated that the Department would not specify the types of captioning required, leaving such decisions to the discretion of the movie theater owners and operators.

In the NPRM, the Department requested public comment as to whether public accommodations should be required to exhibit all new movies in captioned format at every showing, whether it would be more appropriate to require captioning less frequently, and, if so, with what frequency captioning should be provided. The Department also inquired as to whether the requirement for captioning should be tied to the conversion of movies from film to the use of a digital format. The Department also asked for public comment regarding the exhibition of all new movies with narrative description, whether it would be more appropriate to require narrative description less frequently, and whether narrative description of movies should be tied to the use of a digital format.

Representatives from the movie industry, a commenter from a non-profit organization, and a disability rights advocacy group provided information in their comments on the status of captioning and video description technology today as well as an update on the transition to digital cinema in the industry. A representative of major movie producers and distributors commented that traditionally open captions were created by "burn-

ing" the captions onto a special print of a selected movie, which the studios would make available to the exhibitors (movie theater owners and operators). Releases with open captions typically would be presented at special screenings. More recently, according to this commenter, alternative methods have been developed for presenting movies with open captions, but their common feature is that the captions are visible to all theatergoers. Closed captioning is an innovation in technology that was first made available in a feature film presentation in late 1997. Closed captioning technology currently in use allows viewers to see captions using a clear panel that is mounted in front of the viewer's seat.⁴ According to commenters from the industry, the panel reflects captions that are shown in reverse on an LED display in the back of the theater, with captions appearing on or near the movie image. Moviegoers may use this technology at any showing at a theater that has been equipped with the technology, so that the theater does not have to arrange limited special screenings.

Video description technology also has existed since 1997, according to a commenter who works with the captioning and video description industry. According to a movie industry commenter, video description requires the creation of a separate script written by specially trained writers called "describers." As the commenter explained, a describer initially listens to the movie without watching it in order to approximate the experience of an audience member who is blind or has low vision. Using software to map out the pauses in the soundtrack, the describer writes a description in the space available. After an initial script is written for video description, it is edited and checked for timing, continuity, accuracy, and a natural flow. A narrator then records the new script to match the corresponding movie. This same industry commenter said that video description currently is provided in theaters through screens equipped with the same type of technology as that used for closed captioning. As commenters explained, technologies in use today deliver video descriptions via infrared or FM listening systems to headsets worn by individuals who are blind or have low vision.

According to the commenter representing major movie producers and distributors, the

⁴Other closed captioning technologies for movies that have been developed but are not in use at this time include hand-held displays similar to a PDA (personal digital assistant); eyeglasses fitted with a prism over one lens; and projected bitmap captions. The PDA and eyeglass systems use a wireless transmitter to send the captions to the display device.

percentage of motion pictures produced with closed captioning by its member studios had grown to 88 percent of total releases by 2007; the percentage of motion pictures produced with open captioning by its member studios had grown to 78 percent of total releases by 2007; and the percentage of motion pictures provided with video description has ranged consistently between 50 percent and 60 percent of total releases. It is the movie producers and distributors, not the movie theater owners and operators, who determine what to caption and describe, the type of captioning to use, and the content of the captions and video description script. These same producers and distributors also assume the costs of captioning and describing movies. Movie theater owners and operators simply purchase the equipment to display the captions and play the video description in their auditoria.

The transition to digital cinema, considered by the industry to be one of the most profound advancements in motion picture production and technology of the last 100 years, will provide numerous advantages both for the industry and the audience. According to one commenter, currently there are sufficient standards and interim solutions to support captioning and video description now in digital format. Additionally, movie studios are supporting those efforts by providing accessibility tracks (captioning and video description) in many digital cinema content packages. Moreover, a group of industry commenters composed in pertinent part of members of the motion picture industry, the central standards organizations for this industry, and key digital equipment vendors, noted that they are participating in a joint venture to establish the remaining accessibility specifications and standards for access audio tracks. Access audio tracks are supplemental sound audio tracks for the hard of hearing and narrative audio tracks for individuals who have vision disabilities. According to a commenter and to industry documents, these standards were expected to be in place by spring 2009. According to a commenter, at that time, all of the major digital cinema equipment vendors were expected to have support for a variety of closed caption display and video description products. This same commenter stated that these technologies will be supported by the studios that produce and distribute feature films, by the theaters that show these films to the public, and by the full complement of equipment in the production, distribution, and display chain.

The initial investment for movie theater owners and operators to convert to digital cinema is expensive. One industry commenter estimated that converting theaters to digital projection costs between \$70,000 and \$100,000 per screen and that maintenance costs for digital projectors are estimated to

run between \$5,000 and \$10,000 a year—approximately five times as expensive as the maintenance costs for film projectors. According to this same commenter, while there has been progress in making the conversion, only approximately 5,000 screens out of 38,794 nationwide have been converted, and the cost to make the remaining conversions involves a total investment of several billion dollars. According to another commenter, predictions as to when more than half of all screens will have been converted to digital projection are 10 years or more, depending on the finances of the movie theater owners and operators, the state of the economy, and the incentives supporting conversion. That said, according to one commenter who represents movie theater owners and operators, the majority of screens in the United States were expected to enter into agreements by the end of 2008 to convert to digital cinema. Most importantly, however, according to a few commenters, the systems in place today for captioning and video description will not become obsolete once a theater has converted to digital cinema but still can be used by the movie theater owner and operator to exhibit captions and video description. The only difference for a movie theater owner or operator will be the way the data is delivered to the captioning and video description equipment in place in an auditorium.

Despite the current availability of movies that are captioned and provide video description, movie theater owners and operators rarely exhibit the captions or descriptions. According to several commenters, less than 1 percent of all movies being exhibited in theaters are shown with captions.

Individuals with disabilities, advocacy groups, the representative from a non-profit, and representatives of State governments, including 11 State attorneys general, overwhelmingly supported issuance of a regulation requiring movie theater owners and operators to exhibit captioned and video described movies at all showings unless doing so would result in an undue burden or fundamental alteration of the goods and services offered by the public accommodation. In addition, this same group of commenters urged that any such regulation should be made effective now, and should not be tied to the conversion to digital cinema by the movie theater owners and operators. In support of such arguments, these commenters stated that the technology exists now to display movies with captions and video descriptions, regardless of whether the movie is exhibited on film or using digital cinema. Moreover, since the technology in use for displaying captions and video descriptions on film will be compatible with digital projection systems, they argued, there is no need to postpone implementation of a captioning or

video description regulation until the conversion to digital has been made. Furthermore, since the conversion to digital may take years, commenters urged the Department to issue a regulation requiring captioning and video description now, rather than several years from now.

Advocacy groups and the 11 State attorneys general also requested that any regulation include factors describing what constitutes effective captioning and video description. Recommendations included requiring that captioning be within the same line of sight to the screen as the movie so that individuals who are deaf or hard of hearing can watch the movie and read the captions at the same time; that the captioning be accessible from each seat; that the captions be of sufficient size and contrast to the background so as to be readable easily; and that the recent recommendations of the Telecommunications and Electronics and Information Technology Advisory Committee Report to the Access Board that captions be “timely, accurate, complete, and efficient”⁵ also be included.

The State attorneys general supported the Department’s statement in the NPRM that the Department did not anticipate specifying which type of captioning to provide or what type of technology to use to provide video description, but would instead leave that to the discretion of the movie theater owners and operators. These State attorneys general opined that such discretion in the selection of the type of technology was consistent with the statutory and regulatory scheme of the ADA and would permit any new regulation to keep pace with future advancements in captioning and video description technology. These same commenters stated that such discretion may result in a mixed use of both closed captioning and open captioning, affording more choices both for the movie theater owners and operators and for individuals who are deaf or hard of hearing.

The representatives from the movie theater industry strongly urged the Department against issuing a regulation requiring captioning or video description. These commenters argued that the legislative history of the ADA expressly precluded regulating in the area of captioning. (These same commenters were silent with regard to video description on this issue.) The industry commenters also argued that to require movie theater owners and operators to exhibit captioned and video described movies would constitute a fundamental alteration in the

nature of the goods and services offered by the movie theater owners and operators. In addition, some industry commenters argued that any such regulation by the Department would be inconsistent with the Access Board’s guidelines. Also, these commenters noted the progress that has been made in the industry in making cinema more accessible even though there is no mandate to caption or describe movies, and they questioned whether any mandate is necessary. Finally, all the industry commenters argued that to require captioning or video description in 100 percent of movie theater screens for all showings would constitute an undue burden.

The comments have provided the Department with significant information on the state of the movie industry with regard to the availability of captioning and video description, the status of closed captioning technology, and the status of the transition to digital cinema. The Department also has given due consideration to the comments it has received from individuals, advocacy groups, governmental entities, and representatives of the movie industry. Recently, the United States Court of Appeals for the Ninth Circuit held that the ADA requires a chain of movie theaters to exhibit movies with closed captioning and video description unless the theaters can show that to do so would amount to a fundamental alteration or undue burden. *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666 (9th Cir. 2010). However, rather than issue specific regulatory text at this time, the Department has determined that it should obtain additional information regarding issues raised by commenters that were not contemplated at the time of the 2008 NPRM, supplemental technical information, and updated information regarding the current and future status of the conversion to digital cinema by movie theater owners and operators. To this end, the Department is planning to engage in rulemaking relating specifically to movie captioning under the ADA in the near future.

Section 36.304 Removal of Barriers

With the adoption of the 2010 Standards, an important issue that the Department must address is the effect that the new (referred to as “supplemental”) and revised ADA Standards will have on the continuing obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so. See 42 U.S.C. 12182(b)(2)(A)(iv). This issue was not addressed in the 2004 ADAAG because it was outside the scope of the Access Board’s statutory authority under the ADA and section 502 of the Rehabilitation Act of 1973. See 29

⁵Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (April 2008), available at <http://www.access-board.gov/sec508/refresh/report/> (last visited June 24, 2010).

U.S.C. 792(b)(3)(A)–(B) (authorizing the Access Board to establish and maintain minimum guidelines for the standards issued pursuant to the Architectural Barriers Act of 1968 and titles II and III of the ADA). Responsibility for implementing title III's requirement that public accommodations eliminate barriers in existing facilities where such removal is readily achievable rests solely with the Department. The term "existing facility" is defined in §36.104 of the final rule. This definition is discussed in more detail above. See Appendix A discussion of definitions (§36.104).

The requirements for barrier removal by public accommodations are established in the Department's title III regulation. 28 CFR 36.304. Under this regulation, the Department used the 1991 Standards as a guide to identify what constitutes an architectural barrier, as well as the specifications that covered entities must follow in making architectural changes to remove the barrier to the extent that such removal is readily achievable. 28 CFR 36.304(d); 28 CFR part 36, app. A (2009). With adoption of the final rule, public accommodations will now be guided by the 2010 Standards, defined in §36.104 as the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36.

The 2010 Standards include technical and scoping specifications for a number of elements that were not addressed specifically in the 1991 Standards; these new requirements were identified as "supplemental requirements" in the NPRM. The 2010 Standards also include revisions to technical or scoping specifications for certain elements that were addressed in the 1991 Standards, *i.e.*, elements for which there already were technical and scoping specifications. Requirements for which there are revised technical or scoping specifications in the 2010 Standards are referred to in the NPRM as "incremental changes."

The Department expressed concern that requiring barrier removal for incremental changes might place unnecessary cost burdens on businesses that already had removed barriers in existing facilities in compliance with the 1991 Standards. With this rule-making, the Department sought to strike an appropriate balance between ensuring that individuals with disabilities are provided access to facilities and mitigating potential financial burdens from barrier removal on existing places of public accommodation that satisfied their obligations under the 1991 Standards.

In the NPRM, the Department proposed several potential additions to §36.304(d) that might reduce such financial burdens. First, the Department proposed a safe harbor for elements in existing facilities that were compliant with the 1991 Standards. Under this approach, an element that is not altered after the effective date of the 2010 Standards

and that complies with the scoping and technical requirements for that element in the 1991 Standards would not be required to undergo modification to comply with the 2010 Standards to satisfy the ADA's barrier removal obligations. The public accommodation would thus be deemed to have met its barrier removal obligation with respect to that element.

The Department received many comments on this issue during the 60-day public comment period. After consideration of all relevant information presented on the issue, it is the Department's view that this element-by-element safe harbor provision should be retained in the final rule. This issue is discussed further below.

Second, the NPRM proposed several exceptions and exemptions from certain supplemental requirements to mitigate the barrier removal obligations of existing play areas and recreation facilities under the 2004 ADAAG. These proposals elicited many comments from both the business and disability communities. After consideration of all relevant information presented on the issue, it is the Department's view that these exceptions and exemptions should not be retained in the final rule. The specific proposals and comments, and the Department's conclusions, are discussed below.

Third, the NPRM proposed a new safe harbor approach to readily achievable barrier removal as applied to qualified small businesses. This proposed small business safe harbor was based on suggestions from small business advocacy groups that requested clearer guidance on the barrier removal obligations for small businesses. According to these groups, the Department's traditional approach to barrier removal disproportionately affects small businesses. They argued that most small businesses owners neither are equipped to understand the ADA Standards nor can they afford the architects, consultants, and attorneys that might provide some level of assurance of compliance with the ADA. For these same reasons, these commenters contended, small business owners are vulnerable to litigation, particularly lawsuits arising under title III, and often are forced to settle because the ADA Standards' complexity makes inadvertent noncompliance likely, even when a small business owner is acting in good faith, or because the business cannot afford the costs of litigation.

To address these and similar concerns, the NPRM proposed a level of barrier removal expenditures at which qualified small businesses would be deemed to have met their readily achievable barrier removal obligations for certain tax years. This safe harbor would have provided some protection from litigation because compliance could be assessed easily. Such a rule, the Department believed, also could further accessibility, because qualified small businesses would have

an incentive to incorporate barrier removal into short- and long-term planning. The Department recognized that a qualified small business safe harbor would be a significant change to the Department's title III enforcement scheme. Accordingly, the Department sought comment on whether such an approach would further the aims underlying the statute's barrier removal provisions, and, if so, the appropriate parameters of the provision.

After consideration of the many comments received on this issue, the Department has decided not to include a qualified small business safe harbor in the final rule. This decision is discussed more fully below.

Element-by-element safe harbor for public accommodations. Public accommodations have a continuing obligation to remove certain architectural, communications, and transportation barriers in existing facilities to the extent readily achievable. 42 U.S.C. 12182(b)(2)(A)(iv). Because the Department uses the ADA Standards as a guide to identifying what constitutes an architectural barrier, the 2010 Standards, once they become effective, will provide a new reference point for assessing an entity's barrier removal obligations. The 2010 Standards introduce technical and scoping specifications for many elements that were not included in the 1991 Standards. Accordingly, public accommodations will have to consider these supplemental requirements when evaluating whether there are covered barriers in existing facilities, and, if so, remove them to the extent readily achievable. Also included in the 2010 Standards are revised technical and scoping requirements for elements that were addressed in the 1991 Standards. These incremental changes were made to address technological changes that have occurred since the promulgation of the 1991 Standards, to reflect additional study by the Access Board, and to harmonize ADAAG requirements with the model codes.

In the NPRM, the Department sought input on a safe harbor in proposed §36.304(d)(2) intended to address concerns about the practical effects of the incremental changes on public accommodations' readily achievable barrier removal obligations. The proposed element-by-element safe harbor provided that in existing facilities elements that are, as of the effective date of the 2010 Standards, fully compliant with the applicable technical and scoping requirements in the 1991 Standards, need not be modified or retrofitted to meet the 2010 Standards, until and unless those elements are altered. The Department posited that it would be an inefficient use of resources to require covered entities that have complied with the 1991 Standards to retrofit already compliant elements when the change might only provide a minimal improvement in accessibility. In addition, the Department was

concerned that covered entities would have a strong disincentive for voluntary compliance if every time the applicable standards were revised covered entities would be required once again to modify elements to keep pace with new requirements. The Department recognized that revisions to some elements might confer a significant benefit on some individuals with disabilities and because of the safe harbor these benefits would be unavailable until the facility undergoes alterations.

The Department received many comments on this issue from the business and disability communities. Business owners and operators, industry groups and trade associations, and business advocacy organizations strongly supported the element-by-element safe harbor. By contrast, disability advocacy organizations and individuals commenting on behalf of the disability community were opposed to this safe harbor with near unanimity.

Businesses and business groups agreed with the concerns outlined by the Department in the NPRM, and asserted that the element-by-element safe harbor is integral to ensuring continued good faith compliance efforts by covered entities. These commenters argued that the financial cost and business disruption resulting from retrofitting elements constructed or previously modified to comply with 1991 Standards would be detrimental to nearly all businesses and not readily achievable for most. They contended that it would be fundamentally unfair to place these entities in a position where, despite full compliance with the 1991 Standards, the entities would now, overnight, be vulnerable to barrier removal litigation. They further contended that public accommodations will have little incentive to undertake large barrier removal projects or incorporate barrier removal into long-term planning if there is no assurance that the actions taken and money spent for barrier removal would offer some protection from litigation. One commenter also pointed out that the proposed safe harbor would be consistent with practices under other Federal accessibility standards, including the Uniform Federal Accessibility Standards (UFAS) and the ADAAG.

Some business commenters urged the Department to expand the element-by-element safe harbor to include supplemental requirements. These commenters argued that imposing the 2010 Standards on existing facilities will provide a strong incentive for such facilities to eliminate some elements entirely, particularly where the element is not critical to the public accommodation's business or operations (*e.g.*, play areas in fast food restaurants) or the cost of retrofitting is significant. Some of these same commenters urged the Department to include within the safe harbor those elements not

covered by the 1991 Standards, but which an entity had built in compliance with State or local accessibility laws. Other commenters requested safe harbor protection where a business had attempted barrier removal prior to the establishment of technical and scoping requirements for a particular element (*e.g.*, play area equipment) if the business could show that the element now covered by the 2010 Standards was functionally accessible.

Other commenters noted ambiguity in the NPRM as to whether the element-by-element safe harbor applies only to elements that comply fully with the 1991 Standards, or also encompasses elements that comply with the 1991 Standards to the extent readily achievable. Some commenters proposed that the safe harbor should exist in perpetuity—that an element subject to a safe harbor at one point in time also should be afforded the same protection with respect to all future revisions to the ADA Standards (as with many building codes). These groups contended that allowing permanent compliance with the 1991 Standards will ensure readily accessible and usable facilities while also mitigating the need for expensive and time-consuming documentation of changes and maintenance.

A number of commenters inquired about the effect of the element-by-element safe harbor on elements that are not in strict compliance with the 1991 Standards, but conform to the terms of settlement agreements or consent decrees resulting from private litigation or Federal enforcement actions. These commenters noted that litigation or threatened litigation often has resulted in compromise among parties as to what is readily achievable. Business groups argued that facilities that have made modifications subject to those negotiated agreements should not be subject to the risk of further litigation as a result of the 2010 Standards.

Lastly, some business groups that supported the element-by-element safe harbor nevertheless contended that a better approach would be to separate barrier removal altogether from the 2010 Standards, such that the 2010 Standards would not be used to determine whether access to an existing facility is impeded by architectural barriers. These commenters argued that application of the 2010 Standards to barrier removal obligations is contrary to the ADA's directive that barrier removal is required only where "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. 12181(9).

Nearly all commenters from the disability community objected to the proposed element-by-element safe harbor. These commenters asserted that the adoption of this safe harbor would permit and sanction the retention of outdated access standards even in cases where retrofitting to the 2010 Standards would be readily achievable. They ar-

gued that title III's readily achievable defense is adequate to address businesses' cost concerns, and rejected the premise that requiring businesses to retrofit currently compliant elements would be an inefficient use of resources where readily achievable to do so. The proposed regulations, these commenters asserted, incorporate advances in technology, design, and construction, and reflect congressional and societal understanding that accessibility is not a static concept and that the ADA is a civil rights law intended to maximize accessibility. Additionally, these commenters noted that since the 2004 revision of the ADAAG will not be the last, setting a precedent of safe harbors for compliant elements will have the effect of preserving and protecting layers of increasingly outdated accessibility standards.

Many commenters objected to the Department's characterization of the requirements subject to the safe harbor as reflecting only incremental changes and asserted that many of these incremental changes will result in significantly enhanced accessibility at little cost. The requirement concerning side-reach ranges was highlighted as an example of such requirements. Commenters from the disability community argued that the revised maximum side-reach range (from 54 inches to 48 inches) will result in a substantial increase in accessibility for many persons with disabilities—particularly individuals of short stature, for whom the revised reach range represents the difference between independent access to many features and dependence—and that the revisions should be made where readily achievable to do so. Business commenters, on the other hand, contended that application of the safe harbor to this requirement is critical because retrofitting items, such as light switches and thermostats often requires work (*e.g.*, rewiring, patching, painting, and re-wallpapering), that would be extremely burdensome for entities to undertake. These commenters argued that such a burden is not justified where many of the affected entities already have retrofitted to meet the 1991 Standards.

Some commenters that were opposed to the element-by-element safe harbor proposed that an entity's past efforts to comply with the 1991 Standards might appropriately be a factor in the readily achievable analysis. Several commenters proposed a temporary 5-year safe harbor that would provide reassurance and stability to covered entities that have recently taken proactive steps for barrier removal, but would also avoid the problems of preserving access deficits in perpetuity and creating multiple standards as subsequent updates are adopted.

After consideration of all relevant information presented on this issue during the comment period, the Department has decided to retain the proposed element-by-element safe harbor. Title III's architectural-

barrier provisions place the most significant requirements of accessibility on new construction and alterations. The aim is to require businesses to make their facilities fully accessible at the time they are first constructing or altering those facilities, when burdens are less and many design elements will necessarily be in flux, and to impose a correspondingly lesser duty on businesses that are not changing their facilities. The Department believes that it would be consistent with this statutory structure not to change the requirements for design elements that were specifically addressed in our prior standards for those facilities that were built or altered in full compliance with those standards. The Department similarly believes it would be consistent with the statutory scheme not to change the requirements for design elements that were specifically addressed in our prior standards for those existing facilities that came into full compliance with those standards. Accordingly, the final rule at § 36.304(d)(2)(i) provides that elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards. The safe harbor adopted is consistent in principle with the proposed provision in the NPRM, and reflects the Department's determination that this approach furthers the statute's barrier removal provisions and promotes continued good-faith compliance by public accommodations.

The element-by-element safe harbor adopted in this final rule is a narrow one. The Department recognizes that this safe harbor will delay, in some cases, the increased accessibility that the incremental changes would provide and that for some individuals with disabilities the impact may be significant. This safe harbor, however, is not a blanket exemption for every element in existing facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each existing facility.

Section 36.304(d)(2)(ii)(A) provides that prior to the compliance date of the rule March 15, 2012, noncompliant elements that have not been altered are obligated to be modified to the extent readily achievable to comply with the requirements set forth in the 1991 Standards or the 2010 Standards. Section 36.304(d)(2)(ii)(B) provides that after the date the 2010 Standards take effect (18 months after publication of the rule), noncompliant elements that have not been altered must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

The Department has not expanded the scope of the element-by-element safe harbor beyond those elements subject to the incremental changes. The Department has added § 36.304(d)(2)(iii), explicitly clarifying that existing elements subject to supplemental requirements for which scoping and technical specifications are provided for the first time in the 2010 Standards (*e.g.*, play area requirements) are not covered by the safe harbor and, therefore, must be modified to comply with the 2010 Standards to the extent readily achievable. Section 36.304(d)(2)(iii) also identifies the elements in the 2010 Standards that are not eligible for the element-by-element safe harbor. The safe harbor also does not apply to the accessible routes not previously scoped in the 1991 standards, such as those required to connect the boundary of each area of sport activity, including soccer fields, basketball courts, baseball fields, running tracks, skating rinks, and areas surrounding a piece of gymnastic equipment. *See* Advisory note to section F206.2.2 of the 2010 Standards. The resource and fairness concerns underlying the element-by-element safe harbor are not implicated by barrier removal involving supplemental requirements. Public accommodations have not been subject previously to technical and scoping specifications for these supplemental requirements. Thus, with respect to supplemental requirements, the existing readily achievable standard best maximizes accessibility in the built environment without imposing unnecessary burdens on public accommodations.

The Department also has declined to expand the element-by-element safe harbor to cover existing elements subject to supplemental requirements that also may have been built in compliance with State or local accessibility laws. Measures taken to remove barriers under a Federal accessibility provision logically must be considered in regard to Federal standards, in this case the 2010 Standards. This approach is based on the Department's determination that reference to ADA Standards for barrier removal will promote certainty, safety, and good design while still permitting slight deviations through readily achievable alternative methods. The Department continues to believe that this approach provides an appropriate and workable framework for implementation of title III's barrier removal provisions. Because compliance with State or local accessibility codes is not a reliable indicator of effective access for purposes of the ADA Standards, the Department has decided not to include reliance on such codes as part of the safe harbor provision.

Only elements compliant with the 1991 Standards are eligible for the safe harbor. Thus, where a public accommodation attempted barrier removal but full compliance with the 1991 Standards was not readily

achievable, the modified element does not fall within the scope of the safe harbor provision. A public accommodation at any point in time must remove barriers to the extent readily achievable. For existing elements, for which removal is not readily achievable at any given time, the public accommodation must provide its goods, services, facilities, privileges, advantages, or accommodations through alternative methods that are readily achievable. *See* 42 U.S.C. 12182(b)(2)(A)(iv), (v).

One-time evaluation and implementation of the readily achievable standard is not the end of the public accommodation's barrier-removal obligation. Public accommodations have a continuing obligation to reevaluate barrier removal on a regular basis. For example, if a public accommodation identified barriers under the 1991 Standards but did not remove them because removal was not readily achievable based on cost considerations, it has a continuing obligation to remove these barriers if the economic considerations for the public accommodation change. The fact that the public accommodation has been providing its goods or services through alternative methods does not negate the continuing obligation to assess whether removal of the barrier at issue has become readily achievable. Public accommodations should incorporate consideration of their continuing barrier removal obligations in both short-term and long-term business planning.

The Department notes that commenters across the board expressed concern with recordkeeping burdens implicated by the element-by-element safe harbor. Businesses noted the additional costs and administrative burdens associated with identifying elements that fall within the element-by-element safe harbor, as well as tracking, documenting, and maintaining data on installation dates. Disability advocates expressed concern that varying compliance standards will make enforcement efforts more difficult, and urged the Department to clarify that title III entities bear the burden of proof regarding entitlement to safe harbor protection. The Department emphasizes that public accommodations wishing to benefit from the element-by-element safe harbor must demonstrate their safe harbor eligibility. The Department encourages public accommodations to take appropriate steps to confirm and document the compliance of existing elements with the 1991 Standards. Finally, while the Department has decided not to adopt in this rulemaking the suggestion by some commenters to make the protection afforded by the element-by-element safe harbor temporary, the Department believes this proposal merits further consideration. The Department, therefore, will continue to evaluate the efficacy and appropriateness of a safe harbor expiration or sunset provision.

Application to specific scenarios raised in comments. In response to the NPRM, the Department received a number of comments that raised issues regarding application of the element-by-element safe harbor to particular situations. Business commenters requested guidance on whether the replacement for a broken or malfunctioning element that is covered by the 1991 Standards would have to comply with the 2010 Standards. These commenters expressed concern that in some cases replacement of a broken fixture might necessitate moving a number of other accessible fixtures (such as in a bathroom) in order to comply with the fixture and space requirements of the 2010 Standards. Others questioned the effect of the new standards where an entity replaces an existing element currently protected by the safe harbor provision for water or energy conservation reasons. The Department intends to address these types of scenarios in technical guidance.

Effective date for barrier removal. Several commenters expressed concern that the NPRM did not propose a transition period for applying the 2004 ADAAG to barrier removal in existing facilities in cases where the safe harbors do not apply. These commenters argued that for newly covered elements, they needed time to hire attorneys and consultants to assess the impact of the new requirements, determine whether they need to make additional retrofits, price those retrofits, assess whether the change actually is "readily achievable," obtain approval for the removal from owners who must pay for the changes, obtain permits, and then do the actual work. The commenters recognized that there may be some barrier removal actions that require little planning, but stated that other actions cost significantly more and require more budgeting, planning, and construction time.

Barrier removal has been an ongoing requirement that has applied to public accommodations since the original regulation took effect on January 26, 1992. The final rule maintains the existing regulatory provision that barrier removal does not have to be undertaken unless it is "readily achievable." The Department has provided in §36.304(d)(2)(ii)(B) that public accommodations are not required to apply the 2010 Standards to barrier removal until 18 months after the publication date of this rule. It is the Department's view that 18 months is a sufficient amount of time for application of the 2010 Standards to barrier removal for those elements not subject to the safe harbor. This is also consistent with the compliance date the Department has specified for applying the 2010 Standards to new construction and alterations.

Reduced scoping for play areas and other recreation facilities.

Play areas. The Access Board published final guidelines for play areas in October 2000. 65 FR 62498 (Oct. 18, 2000). The guidelines include requirements for ground-level and elevated play components, accessible routes connecting the components, accessible ground surfaces, and maintenance of those surfaces. They have been referenced in Federal playground construction and safety guidelines and in some State and local codes and have been used voluntarily when many play areas across the country have been altered or constructed.

In adopting the 2004 ADAAG (which includes the play area guidelines published in 2000), the Department acknowledges both the importance of integrated, full access to play areas for children and parents with disabilities as well as the need to avoid placing an untenable fiscal burden on businesses. Consequently, the Department asked seven questions in the NPRM related to existing play areas. Two questions related to safe harbors: one on the appropriateness of a general safe harbor for existing play areas and another on public accommodations that have complied with State or local standards specific to play areas. The others related to reduced scoping, limited exemptions, and whether there is a “tipping point” at which the costs of compliance with supplemental requirements would be so burdensome that a public accommodation would shut down a program rather than comply with the new requirements. In the nearly 100 comments received on title III play areas, the majority of commenters strongly opposed all safe harbors, exemptions, and reductions in scoping, and questioned the feasibility of determining a tipping point. A smaller number of commenters advocated for a safe harbor from compliance with the 2004 ADAAG play area requirements along with reduced scoping and exemptions for both readily achievable barrier removal and alterations.

Commenters were split as to whether the Department should exempt owners and operators of public accommodations from compliance with the supplemental requirements for play areas and recreation facilities and instead continue to determine accessibility in these facilities on a case-by-case basis under existing law. Many commenters were of the view that the exemption was not necessary because concerns of financial burden are addressed adequately by the defenses inherent in the standard for what constitutes readily achievable barrier removal. A number of commenters found the exemption inappropriate because no standards for play areas previously existed. Commenters also were concerned that a safe harbor applicable only to play areas and recreation facilities (but not to other facilities operated by a public accommodation) would create confusion, significantly limit access for children and parents with disabilities, and perpetuate

the discrimination and segregation individuals with disabilities face in the important social arenas of play and recreation—areas where little access has been provided in the absence of specific standards. Many commenters suggested that instead of an exemption, the Department should provide guidance on barrier removal with respect to play areas and other recreation facilities.

Several commenters supported the exemption, mainly on the basis of the cost of barrier removal. More than one commenter noted that the most expensive aspect of barrier removal on existing play areas is the surfaces for the accessible routes and use zones. Several commenters expressed the view that where a play area is ancillary to a public accommodation (*e.g.*, in quick service restaurants or shopping centers), the play area should be exempt from compliance with the supplemental requirements because barrier removal would be too costly, and as a result, the public accommodation might eliminate the area.

The Department has been persuaded that the ADA’s approach to barrier removal, the readily achievable standard, provides the appropriate balance for the application of the 2010 Standards to existing play areas. Thus, in existing playgrounds, public accommodations will be required to remove barriers to access where these barriers can be removed without much difficulty or expense.

The NPRM asked if there are State and local standards specifically regarding play and recreation area accessibility and whether facilities currently governed by, and in compliance with, such State and local standards or codes should be subject to a safe harbor from compliance with similar applicable requirements in the 2004 ADAAG. The Department also requested comments on whether it would be appropriate for the Access Board to consider the implementation of guidelines that would extend such a safe harbor to play and recreation areas undertaking alterations. In response, no comprehensive State or local codes were identified, and commenters generally noted that because the 2004 ADAAG contained comprehensive accessibility requirements for these unique areas, public accommodations should not be afforded a safe harbor from compliance with them when altering play and recreation areas. The Department is persuaded by these comments that there is insufficient basis to apply a safe harbor for readily achievable barrier removal or alterations for play areas built in compliance with State or local laws.

In the NPRM, the Department requested that public accommodations identify a “tipping point” at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity simply would shut down the playground. In response, no tipping point

was identified. Some commenters noted, however, that the scope of the requirements may create the choice between wholesale replacement of play areas and discontinuance of some play areas, while others speculated that some public accommodations may remove play areas that are merely ancillary amenities rather than incur the cost of barrier removal under the 2010 Standards. The Department has decided that the comments did not establish any clear tipping point and therefore that no regulatory response is appropriate in this area.

The NPRM also asked for comment about the potential effect of exempting existing play areas of less than 1,000 square feet in size from the requirements applicable to play areas. Many trade and business associations favored exempting these small play areas, with some arguing that where the play areas are only ancillary amenities, the cost of barrier removal may dictate that they be closed down. Some commenters sought guidance on the definition of a 1,000-square-foot play area, seeking clarification that seating and bathroom spaces associated with a play area are not included in the size definition. Disability rights advocates, by contrast, overwhelmingly opposed this exemption, arguing that these play areas may be some of the few available in a community; that restaurants and day care facilities are important places for socialization between children with disabilities and those without disabilities; that integrated play is important to the mission of day care centers and that many day care centers and play areas in large cities, such as New York City, have play areas that are less than 1,000 square feet in size; and that 1,000 square feet was an arbitrary size requirement.

The Department agrees that children with disabilities are entitled to access to integrated play opportunities. However, the Department is aware that small public accommodations are concerned about the costs and efforts associated with barrier removal. The Department has given careful consideration as to how best to insulate small entities from overly burdensome costs and undertakings and has concluded that the existing readily achievable standard, not a separate exemption, is an effective and employable method by which to protect these entities. Under the existing readily achievable standard, small public accommodations would be required to comply only with the scoping and technical requirements of the 2010 Standards that are easily accomplishable and able to be carried out without much difficulty or expense. Thus, concerns about prohibitive costs and efforts clearly are addressed by the existing readily achievable standard. Moreover, as evidenced by comments inquiring as to how 1,000-square-foot play areas are to be measured and complaining that the 1,000-square-foot cut-off is

arbitrary, the exemption posited in the NPRM would have been difficult to apply. Finally, a separate exemption would have created confusion as to whether, or when, to apply the exemption or the readily achievable standard. Consequently, the Department has decided that an exemption, separate and apart from the readily achievable standard, is not appropriate or necessary for small private play areas.

In the NPRM, the Department requested public comment as to whether existing play areas should be permitted to substitute additional ground-level play components for the elevated play components that they otherwise would have been required to make accessible. Most commenters opposed this substitution because the guidelines as well as considerations of “readily achievable barrier removal” inherently contain the flexibility necessary for a variety of situations. Such commenters also noted that the Access Board adopted extensive guidelines with ample public input, including significant negotiation and balancing of costs. In addition, commenters advised that including additional ground level play components might result in higher costs because more accessible route surfaces might be required. A limited number of commenters favored substitution. The Department is persuaded by these comments that the proposed substitution of elements may not be beneficial. The current rules applicable to readily achievable barrier removal will be used to determine the number and type of accessible elements appropriate for a specific facility.

In the NPRM, the Department requested public comment on whether it would be appropriate for the Access Board to consider issuing guidelines for alterations to play and recreation facilities that would permit reduced scoping of accessible components or substitution of ground level play components in lieu of elevated play components. The Department received little input on this issue, and most commenters disfavored the suggestion. One commenter that supported this approach conjectured that it would encourage public accommodations to maintain and improve their playgrounds as well as provide more accessibility. The Department is persuaded that it is not necessary to ask the Access Board to revisit this issue.

The NPRM also asked whether only one play area of each type should be required to comply at existing sites with multiple play areas and whether there are other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping. Some commenters were opposed to the concept of requiring compliance at one play area of each type at a site with multiple play areas, citing lack of choice and ongoing segregation of children and adults with disabilities. Other commenters who supported

an exemption and reduced scoping for alterations noted that the play equipment industry has adjusted to, and does not take issue with, the provisions of the 2004 ADAAG; however, they asked for some flexibility in the barrier removal requirements as applied to play equipment, arguing that augmentation of the existing equipment and installation of accessible play surfacing equates to wholesale replacement of the play equipment. The Department is persuaded that the current rules applicable to readily achievable barrier removal should be used to decide which play areas must comply with the supplemental requirements presented in the 2010 Standards.

Swimming pools, wading pools, saunas, and steam rooms. Section 36.304(d)(3)(ii) in the NPRM specified that for measures taken to comply with the barrier removal requirements, existing swimming pools with at least 300 linear feet of swimming pool wall would need to provide only one accessible means of entry that complies with section 1009.2 or section 1009.3 of the 2004 ADAAG, instead of the two means required for new construction. Commenters opposed the Department's reducing the scoping from that required in the 2004 ADAAG. The following were among the factors cited in comments: that swimming is a common therapeutic form of exercise for many individuals with disabilities; that the cost of a swimming pool lift or other options for pool access is readily achievable and can be accomplished without much difficulty or expense; and that the readily achievable standard already provides public accommodations with a means to reduce their scoping requirements. A few commenters cited safety concerns resulting from having just one accessible means of access, and stated that because pools typically have one ladder for every 75 linear feet of pool wall, they should have more than one accessible means of egress. Other commenters either approved or did not oppose providing one accessible means of access for larger pools so long as a lift was used.

Section 36.304(d)(4)(ii) of the NPRM proposed to exempt existing swimming pools with fewer than 300 linear feet of swimming pool wall from the obligation to provide an accessible means of entry. Most commenters strongly opposed this provision, arguing that aquatic activity is a safe and beneficial form of exercise that is particularly appropriate for individuals with disabilities. Many argued that the readily achievable standard for barrier removal is available as a defense and is preferable to creating an exemption for pool operators for whom providing an accessible means of entry would be readily achievable. Commenters who supported this provision apparently assumed that providing an accessible means of entry would be readily achievable and that therefore the exemption is needed so that small pool operators do not have to provide an accessible means of entry.

The Department has carefully considered all the information available to it as well as the comments submitted on these two proposed exemptions for swimming pools owned or operated by title III entities. The Department acknowledges that swimming provides important therapeutic, exercise, and social benefits for many individuals with disabilities and is persuaded that exemption of the vast majority of privately owned or operated pools from the 2010 Standards is neither appropriate nor necessary. The Department agrees with the commenters that title III already contains sufficient limitations on private entities' obligations to remove barriers. In particular, the Department agrees that those public accommodations that can demonstrate that making particular existing swimming pools accessible in accordance with the 2010 Standards is not readily achievable are sufficiently protected from excessive compliance costs. Thus, the Department has eliminated proposed §36.304(d)(3)(ii) and (d)(4)(ii) from the final rule.

Proposed §36.304(d)(4)(iii) would have exempted existing saunas and steam rooms that seat only two individuals from the obligation to remove barriers. This provision generated far fewer comments than the provisions for swimming pools. People who commented were split fairly evenly between those who argued that the readily achievable standard for barrier removal should be applied to all existing saunas and steam rooms and those who argued that all existing saunas and steam rooms, regardless of size, should be exempt from any barrier removal obligations. The Department considered these comments and has decided to eliminate the exemption for existing saunas and steam rooms that seat only two people. Such an exemption for saunas and steam rooms that seat only two people is unnecessary because the readily achievable standard provides sufficient protection against barrier removal that is overly expensive or too difficult. Moreover, the Department believes barrier removal likely will not be readily achievable for most of these small saunas because the nature of their prefabricated forms, which include built-in seats, make it either technically infeasible or too difficult or expensive to remove barriers. Consequently a separate exemption for saunas and steam rooms would have been superfluous. Finally, employing the readily achievable standard for small saunas and steam rooms is consistent with the Department's decisions regarding the proposed exemptions for play areas and swimming pools.

Several commenters also argued in favor of a specific exemption for existing spas. The Department notes that the technically infeasible and readily achievable defenses are applicable equally to existing spas and declines to adopt such an exemption.

The Department also solicited comment on the possibility of exempting existing wading pools from the obligation to remove barriers where readily achievable. Most commenters stated that installing a sloped entry in an existing wading pool is not likely to be feasible. Because covered entities are not required to undertake modifications that are not readily achievable or that would be technically infeasible, the Department believes that the rule as drafted provides sufficient protection from unwarranted expense to the operators of small existing wading pools. Other existing wading pools, particularly those large wading pools found in facilities such as water parks, must be assessed on a case-by-case basis. Therefore, the Department has not included an exemption for wading pools in its final rule.

The Department received several comments recommending that existing wave pools be exempt from barrier removal requirements. The commenters pointed out that existing wave pools often have a sloped entry, but do not have the handrails, level landings, or edge protection required for accessible entry. Because pool bottom slabs are structural, they could be subject to catastrophic failure if the soil pressure stability or the under slab dewatering are not maintained during the installation of these accessibility features in an already-constructed pool. They also argue that the only safe design scenario is to design the wheelchair ramp, pool lift, or transfer access in a side cove where the mean water level largely is unaffected by the wave action, and that this additional construction to an existing wave pool is not readily achievable. If located in the main pool area, the handrails, stanchions, and edge protection for sloped entry will become underwater hazards when the wave action is pushing onto pool users, and the use of a pool lift will not be safe without a means of stabilizing the person against the forces of the waves while using the lift. They also pointed out that a wheelchair would pose a hazard to all wave pool users, in that the wave action might push other pool users into the wheelchair or push the wheelchair into other pool users. The wheelchair would have to be removed from the pool after the user has entered (and has transferred to a flotation device if needed). The commenters did not specify if these two latter concerns are applicable to all wave pools or only to those with more aggressive wave action. The Department has decided that the issue of modifications to wave pools is best addressed on a case-by-case basis, and therefore, this rule does not contain barrier removal exemptions applicable to wave pools.

The Department also received comments suggesting that it is not appropriate to require two accessible means of entry to wave pools, lazy rivers, sand bottom pools, and other water amusements that have only one

point of entry. The Department agrees. The 2010 Standards (at section 242.2, Exception 2) provide that only one means of entry is required for wave pools, lazy rivers, sand bottom pools, and other water amusement where user access is limited to one area.

Other recreation facilities. In the NPRM, the Department asked about a number of issues relating to recreation facilities, such as team or player seating areas, areas of sport activity, exercise machines, boating facilities, fishing piers and platforms, golf courses, and miniature golf courses. The Department asked for public comment on the costs and benefits of applying the 2004 ADAAG to these spaces and facilities. The discussion of the comments received by the Department on these issues and the Department's response to those comments can be found in either the section entitled "Other Issues" of Appendix A to this final rule.

Safe harbor for qualified small businesses. Section 36.304(d)(5) of the NPRM would have provided that a qualified small business would meet its obligation to remove architectural barriers where readily achievable for a given year if, during that tax year, the entity spent at least 1 percent of its gross revenue in the preceding tax year on measures undertaken in compliance with barrier removal requirements. Proposed §36.304(d)(5) has been omitted from the final rule.

The qualified small business safe harbor was proposed in response to small business advocates' requests for clearer guidance on when barrier removal is, and is not, readily achievable. According to these groups, the Department's approach to readily achievable barrier removal disproportionately affects small business for the following reasons: (1) Small businesses are more likely to operate in older buildings and facilities; (2) the 1991 Standards are too numerous and technical for most small business owners to understand and determine how they relate to State and local building or accessibility codes; and (3) small businesses are vulnerable to title III litigation and often are compelled to settle because they cannot afford the litigation costs involved in proving that an action is not readily achievable.

The 2010 Standards go a long way toward meeting the concern of small businesses with regard to achieving compliance with both Federal and State accessibility requirements, because the Access Board harmonized the 2004 ADAAG with the model codes that form the basis of most State and local accessibility codes. Moreover, the element-by-element safe harbor will ensure that unless and until a small business engages in alteration of affected elements, the small business will not have to retrofit elements that were constructed in compliance with the 1991 Standards or, with respect to elements in an existing facility, that were retrofitted to the 1991 Standards in conjunction with the business's

barrier removal obligation prior to the rule's compliance date.

In proposing an additional safe harbor for small businesses, the Department had sought to promulgate a rule that would provide small businesses a level of certainty in short-term and long-term planning with respect to barrier removal. This in turn would benefit individuals with disabilities in that it would encourage small businesses to consider and incorporate barrier removal in their yearly budgets. Such a rule also would provide some protection, through diminished litigation risks, to small businesses that undertake significant barrier removal projects.

As proposed in the NPRM, the qualified small business safe harbor would provide that a qualified small business has met its readily achievable barrier removal obligations for a given year if, during that tax year, the entity has spent at least 1 percent of its gross revenue in the preceding tax year on measures undertaken to comply with title III barrier removal requirements. (Several small business advocacy organizations pointed out an inconsistency between the Department's description of the small business safe harbor in the Section-by-Section Analysis for §36.304 and the proposed regulatory text for that provision. The proposed regulatory text sets out the correct parameters of the proposed rule. The Department does not believe that the error substantively affected the comments on this issue. Some commenters noted the discrepancy and commented on both; others commented more generally on the proposal, so the discrepancy was not relevant.) The Department noted that the efficacy of any proposal for a small business safe harbor would turn on the following two determinations: (1) The definition of a qualified small business, and (2) the formula for calculating what percentage of revenue is sufficient to satisfy the readily achievable presumption.

As proposed in §36.104 in the NPRM, a "qualified small business" is a business entity defined as a small business concern under the regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act. *See* 15 U.S.C. 632; 13 CFR part 121. The Department noted that under section 3(a)(2)(C) of the Small Business Act, Federal departments and agencies are prohibited from prescribing a size standard for categorizing a business concern as a small business unless the department or agency has been authorized specifically to do so or has proposed a size standard in compliance with the criteria set forth in the SBA regulations, has provided an opportunity for public notice and comment on the proposed standard, and has received approval from the Administrator of the SBA to use the standard. *See* 15 U.S.C. 632(a)(2)(C). The Department further noted that Federal agencies or departments promulgating regulations relat-

ing to small businesses usually use SBA size criteria, and they otherwise must be prepared to justify how they arrived at a different standard and why the SBA's regulations do not satisfy the agency's program requirements. *See* 13 CFR 121.903. The ADA does not define "small business" or specifically authorize the Department to prescribe size standards.

In the NPRM, the Department indicated its belief that the size standards developed by the SBA are appropriate for determining which businesses subject to the ADA should be eligible for the small business safe harbor provisions, and proposed to adopt the SBA's size standards to define small businesses for purposes of the qualified small business safe harbor. The SBA's small business size standards define the maximum size that a concern, together with all of its affiliates, may be if it is to be eligible for Federal small business programs or to be considered a small business for the purpose of other Federal agency programs. Concerns primarily engaged in the same kind of economic activity are classified in the same industry regardless of their types of ownership (such as sole proprietorship, partnership, or corporation). Approximately 1200 industries are described in detail in the North American Industry Classification System—United States, 2007. For most businesses, the SBA has established a size standard based on average annual receipts. The majority of places of public accommodation will be classified as small businesses if their average annual receipts are less than \$6.5 million. However, some will qualify with higher annual receipts. The SBA small business size standards should be familiar to many if not most small businesses, and using these standards in the ADA regulation would provide some certainty to owners, operators, and individuals because the SBA's current size standards can be changed only after notice and comment rule-making.

The Department explained in the NPRM that the choice of gross revenue as the basis for calculating the safe harbor threshold was intended to avoid the effect of differences in bookkeeping practices and to maximize accessibility consistent with congressional intent. The Department recognized, however, that entities with similar gross revenue could have very different net revenue, and that this difference might affect what is readily achievable for a particular entity. The Department also recognized that adopting a small business safe harbor would effect a marked change to the Department's current position on barrier removal. Accordingly, the Department sought public comment on whether a presumption should be adopted whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during that tax year, the entity spent at least 1 percent

of its gross revenue in the preceding tax year on barrier removal, and on whether 1 percent is an appropriate amount or whether gross revenue would be the appropriate measure.

The Department received many comments on the proposed qualified small business safe harbor. From the business community, comments were received from individual business owners and operators, industry and trade groups, and advocacy organizations for business and industry. From the disability community, comments were received from individuals, disability advocacy groups, and nonprofit organizations involved in providing services for persons with disabilities or involved in disability-related fields. The Department has considered all relevant matter submitted on this issue during the 60-day public comment period.

Small businesses and industry groups strongly supported a qualified small business safe harbor of some sort, but none supported the structure proposed by the Department in the NPRM. All felt strongly that clarifications and modifications were needed to strengthen the provision and to provide adequate protection from litigation.

Business commenters' objections to the proposed qualified small business safe harbor fell generally into three categories: (1) That gross revenue is an inappropriate and inaccurate basis for determining what is readily achievable by a small business since it does not take into account expenses that may result in a small business operating at a loss; (2) that courts will interpret the regulation to mean that a small business *must* spend 1 percent of gross revenue each year on barrier removal, *i.e.*, that expenditure of 1 percent of gross revenue on barrier removal is always "readily achievable"; and (3) that a similar misinterpretation of the 1 percent gross revenue concept, *i.e.*, that 1 percent of gross revenue is always "readily achievable," will be applied to public accommodations that are not small businesses and that have substantially larger gross revenue. Business groups also expressed significant concern about the recordkeeping burdens they viewed as inherent in the Department's proposal.

Across the board, business commenters objected to the Department's proposed use of gross revenue as the basis for calculating whether the small business safe harbor has been met. All contended that 1 percent of gross revenue is too substantial a trigger for safe harbor protection and would result in barrier removal burdens far exceeding what is readily achievable or "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). These commenters further pointed out that gross revenue and receipts vary considerably from industry to industry depending on the outputs sold in each industry, and that the use of gross revenue or receipts would therefore result in arbitrary and inequitable bur-

dens on those subject to the rule. These commenters stated that the readily achievable analysis, and thus the safe harbor threshold, should be premised on a business's net revenue so that operating expenses are offset before determining what amount might be available for barrier removal. Many business commenters contended that barrier removal is not readily achievable if an entity is operating at a loss, and that a spending formula premised on net revenue can reflect more accurately businesses' ability to engage in barrier removal.

There was no consensus among the business commenters as to a formula that would reflect more accurately what is readily achievable for small businesses with respect to barrier removal. Those that proposed alternative formulas offered little in the way of substantive support for their proposals. One advocacy organization representing a large cross-section of small businesses provided some detail on the gross and net revenue of various industry types and sizes in support of its position that for nearly all small businesses, net revenue is a better indicator of a business's financial ability to spend money on barrier removal. The data also incidentally highlighted the importance and complexity of ensuring that each component in a safe harbor formula accurately informs and contributes to the ultimate question of what is and is not readily achievable for a small business.

Several business groups proposed that a threshold of 0.5 percent (or one-half of 1 percent) of gross revenue, or 2.5 percent of net revenue, spent on ADA compliance might be a workable measure of what is "readily achievable" for small businesses. Other groups proposed 3 to 5 percent of net revenue as a possible measure. Several commenters proposed affording small businesses an option of using gross or net revenue to determine safe harbor eligibility. Another commenter proposed premising the safe harbor threshold on a designated percentage of the amount spent on renovation in a given year. Others proposed averaging gross or net revenue over a number of years to account for cyclical changes in economic and business environments. Additionally, many proposed that an entity should be able to roll over expenditures in excess of the safe harbor for inclusion in safe harbor analysis in subsequent years, to facilitate barrier removal planning and encourage large-scale barrier removal measures.

Another primary concern of many businesses and business groups is that the 1 percent threshold for safe harbor protection would become a de facto "floor" for what is readily achievable for any small business entity. These commenters urged the Department to clarify that readily achievable barrier removal remains the standard, and that in any given case, an entity retains the right

to assert that barrier removal expenditures below the 1 percent threshold are not readily achievable. Other business groups worried that courts would apply the 1 percent calculus to questions of barrier removal by businesses too large to qualify for the small business safe harbor. These commenters requested clarification that the rationale underlying the Department's determination that a percentage of gross revenue can appropriately approximate readily achievable barrier removal for small businesses does not apply outside the small business context.

Small businesses and business groups uniformly requested guidance as to what expenses would be included in barrier removal costs for purposes of determining whether the safe harbor threshold has been met. These commenters contended that any and all expenses associated with ADA compliance—*e.g.*, consultants, architects, engineers, staff training, and recordkeeping—should be included in the calculation. Some proposed that litigation-related expenses, including defensive litigation costs, also should be accounted for in a small business safe harbor. Additionally, several commenters urged the Department to issue a small business compliance guide with detailed guidance and examples regarding application of the readily achievable barrier removal standard and the safe harbor. Some commenters felt that the Department's regulatory efforts should be focused on clarifying the readily achievable standard rather than on introducing a safe harbor based on a set spending level.

Businesses and business groups expressed concern that the Department's proposed small business safe harbor would not alleviate small business vulnerability to litigation. Individuals and advocacy groups were equally concerned that the practical effect of the Department's proposal likely would be to accelerate or advance the initiation of litigation. These commenters pointed out that an individual encountering barriers in small business facilities will not know whether the entity is noncompliant or entitled to safe harbor protection. Safe harbor eligibility can be evaluated only after review of the small business's barrier removal records and financial records. Individuals and advocacy groups argued that the Department should not promulgate a rule by which individuals must file suit to obtain the information needed to determine whether a lawsuit is appropriate in a particular case, and that, therefore, the rule should clarify that small businesses are required to produce such documentation to any individual upon request.

Several commenters noted that a small business safe harbor based on net, rather than gross, revenue would complicate exponentially its efficacy as an affirmative defense, because accounting practices and asserted expenses would be subject to dis-

covery and dispute. One business advocacy group representing a large cross-section of small businesses noted that some small business owners and operators likely would be uncomfortable with producing detailed financial information, or could be prevented from using the safe harbor because of inadvertent recordkeeping deficiencies.

Individuals, advocacy groups, and non-profit organizations commenting on behalf of the disability community uniformly and strongly opposed a safe harbor for qualified small businesses, saying it is fundamentally at odds with the intent of Congress and the plain language of the ADA. These commenters contended that the case-specific factors underlying the statute's readily achievable standard cannot be reconciled with a formulaic accounting approach, and that a blanket formula inherently is less fair, less flexible, and less effective than the current case-by-case determination for whether an action is readily achievable. Moreover, they argued, a small business safe harbor for readily achievable barrier removal is unnecessary because the statutory standard explicitly provides that a business need only spend what is readily achievable—an amount that may be more or less than 1 percent of revenue in any given year.

Several commenters opined that the formulaic approach proposed by the Department overlooks the factors that often prove most conducive and integral to readily achievable barrier removal—planning and prioritization. Many commenters expressed concern that the safe harbor creates an incentive for business entities to forego large-scale barrier removal in favor of smaller, less costly removal projects, regardless of the relative access the measures might provide. Others commented that an emphasis on a formulaic amount rather than readily achievable barrier removal might result in competition among types of disabilities as to which barriers get removed first, or discrimination against particular types of disabilities if barrier removal for those groups is more expensive.

Many commenters opposed to the small business safe harbor proposed clarifications and limiting rules. A substantial number of commenters were strongly opposed to what they perceived as a vastly overbroad and overly complicated definition of "qualified small business" for purposes of eligibility for the safe harbor, and urged the Department to limit the qualified small business safe harbor to those businesses eligible for the ADA small business tax credit under section 44 of the Tax Code. Some commenters from the disability community contended that the spending level that triggers the safe harbor should be cumulative, to reflect the continuing nature of the readily achievable barrier obligation and to preclude a business from erasing years of unjustifiable inaction

or insufficient action by spending up to the safe harbor threshold for one year. These commenters also sought explicit clarification that the small business safe harbor is an affirmative defense.

A number of commenters proposed that a business seeking to use the qualified small business safe harbor should be required to have a written barrier removal plan that contains a prioritized list of significant access barriers, a schedule for removal, and a description of the methods used to identify and prioritize barriers. These commenters argued that only spending consistent with the plan should count toward the qualified small business threshold.

After consideration of all relevant matter presented, the Department has concluded that neither the qualified small business safe harbor proposed in the NPRM nor any of the alternatives proposed by commenters will achieve the Department's intended results. Business and industry commenters uniformly objected to a safe harbor based on gross revenue, argued that 1 percent of gross revenue was out of reach for most, if not all, small businesses, and asserted that a safe harbor based on net revenue would better capture whether and to what extent barrier removal is readily achievable for small businesses. Individuals and disability advocacy groups rejected a set formula as fundamentally inconsistent with the case-specific approach reflected in the statute.

Commenters on both sides noted ambiguity as to which ADA-related costs appropriately should be included in the calculation of the safe harbor threshold, and expressed concern about the practical effect of the proposed safe harbor on litigation. Disability organizations expressed concern that the proposal might increase litigation because individuals with disabilities confronted with barriers in places of public accommodation would not be able to independently assess whether an entity is noncompliant or is, in fact, protected by the small business safe harbor. The Department notes that the concerns about enforcement-related complexity and expense likely would increase exponentially with a small business safe harbor based on net revenue.

The Department continues to believe that promulgation of a small business safe harbor would be within the scope of the Attorney General's mandate under 42 U.S.C. 12186(b) to issue regulations to carry out the provisions of title III. Title III defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. 12181(9), and sets out factors to consider in determining whether an action is readily achievable. While the statutory factors reflect that whether an action is readily achievable is a fact-based determination, there is no inherent inconsistency with the Department's

proposition that a formula based on revenue and barrier removal expenditure could accurately approximate the high end of the level of expenditure that can be considered readily achievable for a circumscribed subset of title III entities defined, in part, by their maximum annual average receipts. Moreover, the Department's obligation under the SBREFA to consider alternative means of compliance for small businesses, *see* 5 U.S.C. 603(c), further supports the Department's conclusion that a well-targeted formula is a reasonable approach to implementation of the statute's readily achievable standard. While the Department ultimately has concluded that a small business safe harbor should not be included in the final rule, the Department continues to believe that it is within the Department's authority to develop and implement such a safe harbor.

As noted above, the business community strongly objected to a safe harbor premised on gross revenue, on the ground that gross revenue is an unreliable indicator of an entity's ability to remove barriers, and urged the Department to formulate a safe harbor based on net revenue. The Department's proposed use of gross revenue was intended to offer a measure of certainty for qualified small businesses while ensuring that those businesses continue to meet their ongoing obligation to remove architectural barriers where doing so is readily achievable.

The Department believes that a qualified small business safe harbor based on net revenue would be an unreliable indicator of what is readily achievable and would be unworkable in practice. Evaluation of what is readily achievable for a small business cannot rest solely on a business's net revenue because many decisions about expenses are inherently subjective, and in some cases a net loss may be more beneficial (in terms of taxes, for example) than a small net profit. The Department does not read the ADA's readily achievable standard to mean necessarily that architectural barrier removal is to be, or should be, a business's last concern, or that a business can claim that every barrier removal obligation is not readily achievable. Therefore, if a qualified small business safe harbor were to be premised on net revenue, assertion of the affirmative defense would trigger discovery and examination of the business's accounting methods and the validity or necessity of offsetting expenses. The practical benefits and legal certainty intended by the NPRM would be lost.

Because there was little to no support for the Department's proposed use of gross revenue and no workable alternatives are available at this time, the Department will not adopt a small business safe harbor in this final rule. Small business public accommodations are subject to the barrier removal requirements set out in §36.304 of the final rule. In addition, the Department plans to

provide small businesses with more detailed guidance on assessing and meeting their barrier removal obligations in a small business compliance guide.

Section 36.308 Seating in Assembly Areas

In the 1991 rule, §36.308 covered seating obligations for public accommodations in assembly areas. It was bifurcated into (a) existing facilities and (b) new construction and alterations. The new construction and alterations provision, §36.308(b), merely stated that assembly areas should be built or altered in accordance with the applicable provisions in the 1991 Standards. Section 36.308(a), by contrast, provided detailed guidelines on what barrier removal was required.

The Department explained in the preamble to the 1991 rule that §36.308 provided specific rules on assembly areas to ensure that wheelchair users, who typically were relegated to inferior seating in the back of assembly areas separate from their friends and family, would be provided access to seats that were integrated and equal in quality to those provided to the general public. Specific guidance on assembly areas was desirable because they are found in many different types of places of public accommodation, ranging from opera houses (places of exhibition or entertainment) to private university lecture halls (places of education), and include assembly areas that range in size from small movie theaters of 100 or fewer seats to 100,000-seat sports stadiums.

In the NPRM, the Department proposed to update §36.308(a) by incorporating some of the applicable assembly area provisions from the 2010 Standards. Upon further review, however, the Department has determined that the need to provide special guidance for assembly areas in a separate section no longer exists, except for specialty seating areas, as discussed below. Since enactment of the ADA, the Department has interpreted the 1991 Standards as a guide for determining the existence of barriers. Courts have affirmed this interpretation. *See, e.g., Colorado Cross Disability Coalition v. Too, Inc.*, 344 F. Supp. 2d 707 (D. Colo. 2004); *Access Now, Inc. v. AMH CGH, Inc.*, 2001 WL 1005593 (S.D. Fla. 2001); *Pascuiti v. New York Yankees*, 87 F. Supp. 2d 221 (S.D.N.Y. 1999). The 2010 Standards now establish detailed guidance for newly constructed and altered assembly areas, which is provided in §36.406(f), and these Standards will serve as a new guide for barrier removal. Accordingly, the former §36.308(a) has been replaced in the final rule. Assembly areas will benefit from the same safe harbor provisions applicable to barrier removal in all places of public accommodations as provided in §36.304(d)(2) of the final rule.

The Department has also decided to remove proposed §36.308(c)(2) from the final

rule. This provision would have required assembly areas with more than 5,000 seats to provide five wheelchair spaces with at least three designated companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating already is addressed more appropriately in ticketing under §36.302(f).

The Department has determined that proposed §36.308(c)(1), addressing specialty seating in assembly areas, should remain as §36.308 in the final rule with additional language. This paragraph is designed to ensure that individuals with disabilities have an opportunity to access specialty seating areas that entitle spectators to distinct services or amenities not generally available to others. This provision is not, as several commenters mistakenly thought, designed to cover luxury boxes and suites. Those areas have separate requirements outlined in section 221 of the 2010 Standards.

Section 36.308 requires only that accessible seating be provided in each area with *distinct* services or amenities. To the extent a covered entity provides multiple seating areas with the same services and amenities, each of those areas would not be distinct and thus all of them would not be required to be accessible. For example, if a facility has similar dining service in two areas, both areas would not need to be made accessible; however, if one dining service area is open to families, while the other is open only to individuals over the age of 21, both areas would need to be made accessible. Factors distinguishing specialty seating areas generally are dictated by the type of facility or event, but may include, for example, such distinct services and amenities as access to wait staff for in-seat food or beverage service; availability of catered food or beverages for pregame, intermission, or post-game events; restricted access to lounges with special amenities, such as couches or flat-screen televisions; or access to team personnel or facilities for team-sponsored events (*e.g.*, autograph sessions, sideline passes, or facility tours) not otherwise available to other spectators.

The NPRM required public accommodations to locate wheelchair seating spaces and companion seats in each specialty seating area within the assembly area. The Department has added language in the final rule stating that public accommodations that cannot place wheelchair seating spaces and companion seats in each specialty area because it is not readily achievable to do so may meet their obligation by providing specialty services or amenities to individuals with disabilities and their companions at other designated accessible locations at no additional cost. For example, if a theater that only has barrier removal obligations provides wait service to spectators in the mezzanine, and it is not readily achievable

to place accessible seating there, it may meet its obligation by providing wait service to patrons with disabilities who use wheelchairs and their companions at other designated accessible locations at no additional cost. This provision does not obviate the obligation to comply with applicable requirements for new construction and alterations, including dispersion of accessible seating.

Section 36.309 Examinations and Courses

Section 36.309(a) sets forth the general rule that any private entity that offers examinations or courses relating to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals. In the NPRM preamble and proposed regulatory amendment and in this final rule, the Department relied on its history of enforcement efforts, research, and body of knowledge of testing and modifications, accommodations, and aids in detailing steps testing entities should take to ensure that persons with disabilities receive appropriate modifications, accommodations, or auxiliary aids in examination and course settings as required by the ADA. The Department received comments from disability rights groups, organizations that administer tests, State governments, professional associations, and individuals on the language appearing in the NPRM preamble and amended regulation and has carefully considered these comments.

The Department initially set out the parameters of appropriate documentation requests relating to examinations and courses covered by this section in the 1991 preamble at 28 CFR part 36, stating that “requests for documentation must be reasonable and must be limited to the need for the modification or aid requested.” See 28 CFR part 36, app. B at 735 (2009). Since that time, the Department, through its enforcement efforts pursuant to section 309, has addressed concerns that requests by testing entities for documentation regarding the existence of an individual’s disability and need for a modification or auxiliary aid or service were often inappropriate and burdensome. The Department proposed language stating that while it may be appropriate for a testing entity to request that an applicant provide documentation supporting the existence of a disability and the need for a modification, accommodation, or auxiliary aid or service, the request by the testing entity for such documentation must be reasonable and limited. The NPRM proposed that testing entities should narrowly tailor requests for documentation, limiting those requests to materials that will allow the testing entities to ascertain

the nature of the disability and the individual’s need for the requested modification, accommodation, or auxiliary aid or service. This proposal codified the 1991 rule’s preamble language regarding testing entities’ requests for information supporting applicants’ requests for testing modifications or accommodations.

Overall, most commenters supported this addition to the regulation. These commenters generally agreed that documentation sought by testing entities to support requests for modifications and testing accommodations should be reasonable and tailored. Commenters noted, for example, that the proposal to require reasonable and tailored documentation requests “is not objectionable. Indeed, it largely tracks DOJ’s longstanding informal guidance that ‘requests for documentation must be reasonable and limited to the need for the modification or aid requested.’”

Commenters including disability rights groups, State governments, professional associations, and individuals made it clear that, in addition to the proposed regulatory change, other significant problems remain for individuals with disabilities who seek necessary modifications to examinations and courses. These problems include detailed questions about the nature of documentation materials submitted by candidates, testing entities’ questioning of documentation provided by qualified professionals with expertise in the particular disability at issue, and lack of timeliness in determining whether to provide requested accommodations or modifications. Several commenters expressed enthusiasm for the preamble language addressing some of these issues, and some of these commenters recommended the incorporation of portions of this preamble language into the regulatory text. Some testing entities expressed concerns and uncertainty about the language in the preamble and sought clarifications about its meaning. These commenters focused most of their attention on the following language from the NPRM preamble:

Generally, a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, or accommodation, or classification, such as eligibility for a special education program. When an applicant’s documentation is recent and demonstrates a consistent history of a diagnosis, there is no need for further inquiry into the nature of the disability. A testing entity should consider an applicant’s past use of a particular auxiliary aid or service.

73 FR 34508, 34539 (June 17, 2008).

Professional organizations, State governments, individuals, and disability rights groups fully supported the Department's preamble language and recommended further modification of the regulations to encompass the issues raised in the preamble. A disability rights group recommended that the Department incorporate the preamble language into the regulations to ensure that "documentation demands are strictly limited in scope and met per se when documentation of previously provided accommodations or aids is provided." One professional education organization noted that many testing corporations disregard the documented diagnoses of qualified professionals, and instead substitute their own, often unqualified diagnoses of individuals with disabilities. Commenters confirmed that testing entities sometimes ask for unreasonable information that is either impossible, or extremely onerous, to provide. A disability rights organization supported the Department's proposals and noted that private testing companies impose burdensome documentation requirements upon applicants with disabilities seeking accommodations and that complying with the documentation requests is frequently so difficult, and negotiations over the requests so prolonged, that test applicants ultimately forgo taking the test. Another disability rights group urged the Department to "expand the final regulatory language to ensure that regulations accurately provide guidance and support the comments made about reducing the burden of documenting the diagnosis and existence of a disability."

Testing entities, although generally supportive of the proposed regulatory amendment, expressed concern regarding the Department's proposed preamble language. The testing entities provided the Department with lengthy comments in which they suggested that the Department's rationale delineated in the preamble potentially could limit them from gathering meaningful and necessary documentation to determine whether, in any given circumstance, a disability is presented, whether modifications are warranted, and which modifications would be most appropriate. Some testing entities raised concerns about individuals skewing testing results by falsely claiming or feigning disabilities as an improper means of seeking advantage on an examination. Several testing entities raised concerns about and sought clarification regarding the Department's use of certain terms and concepts in the preamble, including "without further inquiry," "appropriate documentation," "qualified professional," "individualized assessment," and "consider." These entities discussed the preamble language at length, noting that testing entities need to be able to question some aspects of testing applicants' documentation or to request fur-

ther documentation from some candidates when the initial documentation is unclear or incomplete. One testing entity expressed concern that the Department's preamble language would require the acceptance of a brief note on a doctor's prescription pad as adequate documentation of a disability and the need for an accommodation. One medical examination organization stated that the Department's preamble language would result in persons without disabilities receiving accommodations and passing examinations as part of a broad expansion of unwarranted accommodations, potentially endangering the health and welfare of the general public. Another medical board "strenuously objected" to the "without further inquiry" language. Several of the testing entities expressed concern that the Department's preamble language might require testing companies to accept documentation from persons with temporary or questionable disabilities, making test scores less reliable, harming persons with legitimate entitlements, and resulting in additional expense for testing companies to accommodate more test takers.

It remains the Department's view that, when testing entities receive documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for the modification, accommodation, or aid requested, they shall generally accept such documentation and provide the accommodation.

Several commenters sought clarifications on what types of documentation are acceptable to demonstrate the existence of a disability and the need for a requested modification, accommodation, or aid. The Department believes that appropriate documentation may vary depending on the nature of the disability and the specific modification or aid requested, and accordingly, testing entities should consider a variety of types of information submitted. Examples of types of information to consider include recommendations of qualified professionals familiar with the individual, results of psychoeducational or other professional evaluations, an applicant's history of diagnosis, participation in a special education program, observations by educators, or the applicant's past use of testing accommodations. If an applicant has been granted accommodations post-high school by a standardized testing agency, there is no need for reassessment for a subsequent examination.

Some commenters expressed concern regarding the use of the term "letter" in the proposed preamble sentence regarding appropriate documentation. The NPRM preamble language stated that "[a]ppropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program." 73 FR 34508, 34539 (June 17, 2008).

Some testing entities posited that the preamble language would require them to accept a brief letter from a doctor or even a doctor's note on a prescription pad indicating "I've been treating (student) for ADHD and he/she is entitled to extend time on the ACT." The Department's reference in the NPRM preamble to letters from physicians or other professionals was provided in order to offer examples of some types of acceptable documentation that may be considered by testing entities in evaluating the existence of an applicant's disability and the need for a certain modification, accommodation, or aid. No one piece of evidence may be dispositive in make a testing accommodation determination. The significance of a letter or other communication from a doctor or other qualified professional would depend on the professional's relationship with the candidate and the specific content of the communication, as well as how the letter fits in with the totality of the other factors used to determine testing accommodations under this rule. Similarly, an applicant's failure to provide results from a specific test or evaluation instrument should not of itself preclude approval of requests for modifications, accommodations, or aids if the documentation provided by the applicant, in its entirety, is sufficient to demonstrate that the individual has a disability and requires a requested modification, accommodation, or aid on the relevant examination. This issue is discussed in more detail below.

One disability rights organization noted that requiring a 25-year old who was diagnosed in junior high school with a learning disability and accommodated ever since "to produce elementary school report cards to demonstrate symptomology before the age of seven is unduly burdensome." The same organization commented that requiring an individual with a long and early history of disability to be assessed within three years of taking the test in question is similarly burdensome, stating that "[t]here is no scientific evidence that learning disabilities abate with time, nor that Attention Deficits abate with time * * *." This organization noted that there is no justification for repeatedly subjecting people to expensive testing regimens simply to satisfy a disbelieving industry. This is particularly true for adults with, for example, learning disabilities such as dyslexia, a persistent condition without the need for retesting once the diagnosis has been established and accepted by a standardized testing agency.

Some commenters from testing entities sought clarification regarding who may be considered a "qualified professional." Qualified professionals are licensed or otherwise properly credentialed and possess expertise in the disability for which modifications or accommodations are sought. For example, a podiatrist would not be considered to be a

qualified professional to diagnose a learning disability or support a request for testing accommodations on that basis. Types of professionals who might possess the appropriate credentials and expertise are doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, school counselors, and licensed mental health professionals. Additionally, while testing applicants should present documentation from qualified professionals with expertise in the pertinent field, it also is critical that testing entities that review documentation submitted by prospective examinees in support of requests for testing modifications or accommodations ensure that their own reviews are conducted by qualified professionals with similarly relevant expertise.

Commenters also sought clarification of the term individualized assessment. The Department's intention in using this term is to ensure that documentation provided on behalf of a testing candidate is not only provided by a qualified professional, but also reflects that the qualified professional has individually and personally evaluated the candidate as opposed to simply considering scores from a review of documents. This is particularly important in the learning disabilities context, where proper diagnosis requires face-to-face evaluation. Reports from experts who have personal familiarity with the candidate should take precedence over those from, for example, reviewers for testing agencies, who have never personally met the candidate or conducted the requisite assessments for diagnosis and treatment.

Some testing entities objected to the NPRM preamble's use of the phrase "without further inquiry." The Department's intention here is to address the extent to which testing entities should accept documentation provided by an applicant when the testing entity is determining the need for modifications, accommodations, or auxiliary aids or services. The Department's view is that applicants who submit appropriate documentation, *e.g.*, documentation that is based on the careful individual consideration of the candidate by a professional with expertise relating to the disability in question, should not be subjected to unreasonably burdensome requests for additional documentation. While some testing commenters objected to this standard, it reflects the Department's longstanding position. When an applicant's documentation demonstrates a consistent history of a diagnosis of a disability, and is prepared by a qualified professional who has made an individualized evaluation of the applicant, there is little need for further inquiry into the nature of the disability and generally testing entities should grant the requested modification, accommodation, or aid.

After a careful review of the comments, the Department has decided to maintain the proposed regulatory language on the scope of appropriate documentation in § 36.309(b)(1)(iv). The Department has also added new regulatory language at § 36.309(b)(1)(v) that provides that testing entities shall give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act (IDEA) or a plan providing services pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan). These additions to the regulation are necessary because the Department's position on the bounds of appropriate documentation contained in Appendix B, 28 CFR part 36, app. B (2009), has not been implemented consistently and fully by organizations that administer tests.

The new regulatory language clarifies that an applicant's past use of a particular modification, accommodation, or auxiliary aid or service in a similar testing setting or pursuant to an IEP or Section 504 Plan provides critical information in determining those examination modifications that would be applicable in a given circumstance. The addition of this language and the appropriate weight to be accorded it is seen as important by the Department because the types of accommodations provided in both these circumstances are typically granted in the context of individual consideration of a student's needs by a team of qualified and experienced professionals. Even though these accommodations decisions form a common sense and logical basis for testing entities to rely upon, they are often discounted and ignored by testing entities.

For example, considerable weight is warranted when a student with a Section 504 Plan in place since middle school that includes the accommodations of extra time and a quiet room for testing is seeking these same accommodations from a testing entity covered by section 309 of the Act. In this example, a testing entity receiving such documentation should clearly grant the request for accommodations. A history of test accommodations in secondary schools or in post-secondary institutions, particularly when determined through the rigors of a process required and detailed by Federal law, is as useful and instructive for determining whether a specific accommodation is required as accommodations provided in standardized testing situations.

It is important to note, however, that the inclusion of this weight does not suggest that individuals without IEPs or Section 504

Plans are not also entitled to receive testing accommodations. Indeed, it is recommended that testing entities must consider the entirety of an applicant's history to determine whether that history, even without the context of a IEP or Section 504 Plan, indicates a need for accommodations. In addition, many students with learning disabilities have made use of informal, but effective accommodations. For example, such students often receive undocumented accommodations such as time to complete tests after school or at lunchtime, or being graded on content and not form or spelling of written work. Finally, testing entities shall also consider that because private schools are not subject to the IDEA, students at private schools may have a history of receiving accommodations in similar settings that are not pursuant to an IEP or Section 504 Plan.

Some testing entities sought clarification that they should only be required to consider particular use of past modifications, accommodations, auxiliary aids or services received by testing candidates for prior testing and examination settings. These commenters noted that it would be unhelpful to consider the classroom accommodations for a testing candidate, as those accommodations would not typically apply in a standardized test setting. The Department's history of enforcement in this area has demonstrated that a recent history of past accommodations is critical to an understanding of the applicant's disability and the appropriateness of testing accommodations.

The Department also incorporates the NPRM preamble's "timely manner" concept into the new regulatory language at § 36.309(b)(1)(vi). Under this provision, testing entities are required to respond in a timely manner to requests for testing accommodations in order to ensure equal opportunity for persons with disabilities. Testing entities are to ensure that their established process for securing testing accommodations provides applicants with a reasonable opportunity to supplement the testing entities' requests for additional information, if necessary, and still be able to take the test in the same testing cycle. A disability rights organization commented that testing entities should not subject applicants to unreasonable and intrusive requests for information in a process that should provide persons with disabilities effective modifications in a timely manner, fulfilling the core objective of title III to provide equal access. Echoing this perspective, several disability rights organizations and a State government commenter urged that testing entities should not make unreasonably burdensome demands for documentation, particularly where those demands create impediments to receiving accommodations in a timely manner. Access to examinations should be offered to persons with disabilities in as timely a manner as it

is offered to persons without disabilities. Failure by a testing entity to act in a timely manner, coupled with seeking unnecessary documentation, could result in such an extended delay that it constitutes a denial of equal opportunity or equal treatment in an examination setting for persons with disabilities.

Section 36.311 Mobility Devices

Section 36.311 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various “mobility devices.” Section 36.311 set forth specific requirements for the accommodation of mobility devices, including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, §36.311(a) states the general rule that in any areas open to pedestrians, public accommodations shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of “wheelchair” (*i.e.*, “a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion”), the reference to them in §36.311(a) of the final rule has been omitted to avoid redundancy.

Most business commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public accommodation will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

Legal standard for other power-driven mobility devices. The NPRM version of §36.311(b) provided that a public accommodation “shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation’s goods, services, facilities, privileges, advantages, or accommodations.” 73 FR 34508, 34556 (June 17, 2008). In other words, public accommodations are by default required to permit the use of other power-driven

mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word “reasonable” as it is used in §36.311(b) of the NPRM. Virtually every business and industry commenter took the use of the word “reasonable” to mean that a general reasonableness standard would be applied in making such an assessment. Advocacy and non-profit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public accommodations to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public accommodations would not have to incur the cost of such analyses. Another commenter noted a “fox guarding the hen house”-type of concern with regard to public accommodations developing and enforcing their own modification policy.

In response to comments received, the Department has revised §36.311(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices. The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public accommodation can demonstrate that the use of the device is not reasonable or that its use fundamentally alters the nature of the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation because the Department believes that these exceptions are covered by the general reasonable modification requirement contained in §36.302.

Assessment factors. Section 36.311(c) of the NPRM required public accommodations to “establish policies to permit the use of other power-driven mobility devices” and articulated four factors upon which public accommodations must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (*e.g.*, doctors’ offices, parks, commercial buildings, etc.). 73 FR 34508, 34556 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in §36.311(c) to new paragraph §36.311(b)(2) to clarify what factors the public accommodation shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 36.311(b)(2) now states that “[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public accommodation shall consider” certain enumerated factors. The assessment factors are designed to assist public accommodations in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public accommodations assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of an other power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a particular device in specific venues and suggested that factor 1 say this more specifically.

The term “in relation to a wheelchair” in the NPRM’s factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term “in relation to a wheelchair” from §36.311(b)(2)(i) to clarify that if a facility that is in compliance with the applicable provisions of the 1991 Standards or the 2010 Standards grants

permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device’s appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in “specific venues,” the Department’s intent is captured more clearly by referencing “specific facility” in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public accommodations should not rely solely on a device’s top speed when assessing whether the device can be accommodated; instead, public accommodations should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device. Finally, since the ability of the public accommodation to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM’s version of factor 2 provided that the “potential risk of harm to others by the operation of the mobility device” is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. With this language, the Department intended to incorporate the safety standard found in §36.301(b), which provides that public accommodations may “impose legitimate safety requirements that are necessary for safe operation” into the assessment. However, several commenters indicated that they read this language, particularly the phrase “potential risk of harm” to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public accommodation.

While all applicable affirmative defenses are available to public accommodations in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because §36.301(b) provides public accommodations the appropriate framework with which to assess whether legitimate safety requirements

that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public accommodation. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public accommodations may enforce legitimate safety rules established for the operation of other-power driven mobility devices (e.g., reasonable speed restrictions). Finally, NPRM factor 3 concerning environmental resources and conflicts of law has been relocated to paragraph (b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph 36.311(b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public accommodation that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear, concise statements of specific rules governing the operation of such devices. Finally, the public accommodation should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. See General Services Administration, *Interim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at http://www.gsa.gov/graphics/pbs/Interim_Segway_Policy_121007.pdf (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public accommodation that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (i.e., a credible assurance that the

device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility devices is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility devices; whether, and under which circumstances, storage for the other power-driven mobility devices will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public accommodations also might consider grouping other power-driven mobility devices by type (e.g., EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members of the general public who do not have mobility disabilities.

The Department anticipates that in many circumstances, public accommodations will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities without resulting in a fundamental alteration of a public accommodation's goods, services, facilities, privileges, advantages, or accommodations. Consider the following examples:

Example 1: Although individuals who do not have mobility disabilities are prohibited from operating EPAMDs at a theme park, the park has developed a policy allowing individuals with mobility disabilities to use EPAMDs as their mobility device at the park. The policy states that EPAMDs are allowed in all areas of the theme park that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The public accommodation has determined that the facility provides adequate space for a taller device, such as an EPAMD, and that it does not fundamentally alter the nature of

the theme park's goods and services. The theme park's policies do, however, require that EPAMDs be operated at a safe speed limit. A theme park employee may inquire at the ticket gate whether the device is needed due to the user's disability or may request the presentation of a valid, State-issued, disability parking placard (though presentation of such a placard is not necessary), or other State-issued proof of disability or a credible assurance that the use of the EPAMD is for the individual's mobility disability. The park employee also may inform an individual with a disability using an EPAMD that the theme park's policy requires that it be operated at or below the park's designated speed limit.

Example 2: A shopping mall has developed a policy whereby EPAMDs may be operated by individuals with mobility disabilities in the common pedestrian areas of the mall if the operator of the device agrees to the following: to operate the device no faster than the speed limit set by the policy; to use the elevator, not the escalator; to transport the EPAMD to different levels; to yield to pedestrian traffic; not to leave the device unattended unless it can stand upright and has a locking system; to refrain from using the device temporarily if the mall manager determines that the volume of pedestrian traffic is such that the operation of the device would interfere with legitimate safety requirements; and to present the mall management office with a valid, State-issued, disability parking placard (though presentation of such a placard is not necessary), or State-issued proof of disability, as a credible assurance that the use of the EPAMD is for the individual's mobility disability, upon entry to the mall.

Inquiry into the use of other power-driven mobility device. Section 36.311(d) of the NPRM provided that a "public accommodation may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability. A public accommodation shall not ask a person using a mobility device questions about the nature and extent of the person's disability." 73 FR 34508, 34556 (June 17, 2008).

While business commenters did not take issue with applying this standard to individuals who use wheelchairs, they were not satisfied with the application of this standard to other power-driven mobility devices. Business commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public accommodations in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility device users who do not have mobil-

ity disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public accommodations may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of businesses and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public accommodations or establishments to require proof of a mobility disability. There is no question that public accommodations have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals are also vitally important.

Neither §36.311(d) of the NPRM nor §36.311(c) of the final rule permits inquiries into the nature of a person's mobility disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public accommodations in assessing

whether an individual has a mobility disability and to allow public accommodations to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public accommodation. Consequently, the Department has decided to include regulatory text in §36.311(c)(2) of the final rule that requires public accommodations to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A “valid” disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance’s requirements for disability placards or cards. Public accommodations are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability, as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used

for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public accommodation’s valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public accommodation because notwithstanding such a credible assurance, use of the device in a particular venue may be at odds with the legal standard in §36.311(b)(1) or with one or more of the §36.311(b)(2) factors. Only after an individual with a disability has satisfied all of the public accommodation’s policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public accommodation’s stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public accommodation to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public accommodation’s policy does not permit the device in question on-site under any circumstances (*e.g.*, because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a mall or a restaurant if the mall or restaurant has adopted a policy banning their use for any or all of the above-mentioned reasons.

However, an individual with a mobility disability who has complied with a public accommodation’s stated policies cannot be refused use of the other power-driven mobility device if he or she has provided a credible assurance that the use of the device is for a mobility disability.

SUBPART D—NEW CONSTRUCTION AND ALTERATIONS

Subpart D establishes the title III requirements applicable to new construction and alterations. The Department has amended this subpart to adopt the 2004 ADAAG, set forth the effective dates for implementation of the 2010 Standards, and make related revisions as described below.

Section 36.403 Alterations: Path of Travel

In the NPRM, the Department proposed one change to §36.403 on alterations and path of travel by adding a path of travel safe harbor. Proposed §36.403(a)(1) stated that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

A substantial number of commenters objected to the Department's creation of a safe harbor for alterations to required elements of a path of travel that comply with the current 1991 Standards. These commenters argued that if a public accommodation already is in the process of altering its facility, there should be a legal requirement that individuals with disabilities are entitled to increased accessibility provided by the 2004 ADAAG for path of travel work. These commenters also stated that they did not believe there was a statutory basis for "grandfathering" facilities that comply with the 1991 Standards. Another commenter argued that the updates incorporated into the 2004 ADAAG provide very substantial improvements for access, and that since there already is a 20 percent cost limit on the amount that can be expended on path of travel alterations, there is no need for a further limitation.

Some commenters supported the safe harbor as lessening the economic costs of implementing the 2004 ADAAG for existing facilities. One commenter also stated that without the safe harbor, entities that already have complied with the 1991 Standards will have to make and pay for compliance twice, as compared to those entities that made no effort to comply in the first place. Another commenter asked that the safe harbor be revised to include pre-ADA facilities that have been made compliant with the 1991 Standards to the extent "readily achievable" or, in the case of alterations, "to the maximum extent feasible," but that are not in full compliance with the 1991 Standards.

The final rule retains the safe harbor for required elements of a path of travel to altered primary function areas for private entities that already have complied with the 1991 Standards with respect to those required

elements. As discussed with respect to §36.304, the Department believes that this safe harbor strikes an appropriate balance between ensuring that individuals with disabilities are provided access to buildings and facilities and mitigating potential financial burdens on existing places of public accommodation that are undertaking alterations subject to the 2010 Standards. This safe harbor is not a blanket exemption for facilities. If a private entity undertakes an alteration to a primary function area, only the required elements of a path of travel to that area that already comply with the 1991 Standards are subject to the safe harbor. If a private entity undertakes an alteration to a primary function area and the required elements of a path of travel to the altered area do not comply with the 1991 Standards, then the private entity must bring those elements into compliance with the 2010 Standards.

Section 36.405 Alterations: Historic Preservation

In the 1991 rule, the Department provided guidance on making alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or that are designated as historic under State or local law. That provision referenced the 1991 Standards. Because those cross-references to the 1991 Standards are no longer applicable, it is necessary in this final rule to provide new regulatory text. No substantive change in the Department's approach in this area is intended by this revision.

Section 36.406 Standards for New Construction and Alterations

Applicable standards. Section 306 of the ADA, 42 U.S.C. 12186, directs the Attorney General to issue regulations to implement title III that are consistent with the guidelines published by the Access Board. As described in greater detail elsewhere in this Appendix, the Department is a statutory member of the Access Board and was involved significantly in the development of the 2004 ADAAG. Nonetheless, the Department has reviewed the standards and has determined that additional regulatory provisions are necessary to clarify how the Department will apply the 2010 Standards to places of lodging, social service center establishments, housing at a place of education, assembly areas, and medical care facilities. Those provisions are contained in §36.406(c)–(g). Each of these provisions is discussed below.

Section 36.406(a) adopts the 2004 ADAAG as part of the 2010 Standards and establishes the compliance date and triggering events for the application of those standards to

both new construction and alterations. Appendix B of this final rule (Analysis and Commentary on the 2010 ADA Standards for Accessible Design) provides a description of the major changes in the 2010 Standards (as compared to the 1991 ADAAG) and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. A number of commenters asked the Department to revise certain provisions in the 2004 ADAAG in a manner that would reduce either the required scoping or specific technical accessibility requirements. As previously stated, the ADA requires the Department to adopt standards consistent with the guidelines adopted by the Access Board. The Department will not adopt any standards that provide less accessibility than is provided under the guidelines contained in the 2004 ADAAG because the guidelines adopted by the Access Board are “minimum guidelines.” 42 U.S.C. 12186(c).

In the NPRM, the Department specifically proposed amending §36.406(a) by dividing it into two sections. Proposed §36.406(a)(1) specified that new construction and alterations subject to this part shall comply with the 1991 Standards if physical construction of the property commences less than six months after the effective date of the rule. Proposed §36.406(a)(2) specified that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences six months or more after the effective date of the rule. The Department also proposed deleting the advisory information now published in a table at §36.406(b).

Compliance date. When the ADA was enacted, the compliance dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12181 note. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12183(a)(2). For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—18 months after the 1991 Standards were published by the Department. *See* 42 U.S.C. 12183(a)(1).

The Department received numerous comments on the issue of effective date, many of them similar to those received in response to the ANPRM. A substantial number of commenters advocated a minimum of 18 months from publication of the final rule to the effective date for application of the standards to new construction, consistent with the time period used for implementation of the 1991 Standards. Many of these commenters

argued that the 18-month period was necessary to minimize the likelihood of having to redesign projects already in the design and permitting stages at the time that the final rule is published. According to these commenters, large projects take several years from design to occupancy, and can be subject to delays from obtaining zoning, site approval, third-party design approval (*i.e.*, architectural review), and governmental permits. To the extent the new standards necessitate changes in any previous submissions or permits already issued, businesses might have to expend significant funds and incur delays due to redesign and resubmission.

Some commenters also expressed concern that a six-month period would be hard to implement given that many renovations are planned around retail selling periods, holidays, and other seasonal concerns. For example, hotels plan renovations during their slow periods, retail establishments avoid renovations during the major holiday selling periods, and businesses in certain parts of the country cannot do any major construction during parts of the winter.

Some commenters argued that chain establishments need additional time to redesign their “master facility” designs for replication at multiple locations, taking into account both the new standards and applicable State and local accessibility requirements.

Other commenters argued for extending the effective date from six months to a minimum of 12 months for many of the same reasons, and one commenter argued that there should be a tolling of the effective date for those businesses that are in the midst of the permitting process if the necessary permits are delayed due to legal challenges or other circumstances outside the business’s control.

Several commenters took issue with the Department’s characterization of the 2004 ADAAG and the 1991 Standards as two similar rules. These commenters argued that many provisions in the 2004 ADAAG represent a “substantial and significant” departure from the 1991 Standards and that it will take a great deal of time and money to identify all the changes and implement them. In particular, they were concerned that small businesses lacked the internal resources to respond quickly to the new changes and that they would have to hire outside experts to assist them. One commenter expressed concern that regardless of familiarity with the 2004 ADAAG, since the 2004 ADAAG standards are organized in an entirely different manner from the 1991 Standards, and contain, in the commenter’s view, extensive changes, it will make the shift from the old to the new standards quite complicated.

Several commenters also took issue with the Department’s proffered rationale that by adopting a six-month effective date, the Department was following the precedent of other Federal agencies that have adopted the

2004 ADAAG for facilities whose accessibility they regulate. These commenters argued that the Department's title III regulation applies to a much broader range and number of facilities and programs than the other Federal agencies (*i.e.*, Department of Transportation) and that those agencies regulate accessibility primarily in either governmental facilities or facilities operated by quasi-governmental authorities.

Several commenters representing the travel, vacation, and golf industries argued that the Department should adopt a two-year effective date for new construction. In addition to many of the arguments made by commenters in support of an 18-month effective date, these commenters also argued that a two-year time frame would allow States with DOJ-certified building codes to have the time to amend their codes to meet the 2004 ADAAG so that design professionals can work from compatible codes and standards.

Several commenters recommended treating alterations differently than new construction, arguing for a one-year effective date for alterations. Another commenter representing building officials argued that a minimum of a six-month phase-in for alterations was sufficient, since a very large percentage of alteration projects "are of a scale that they should be able to accommodate the phase-in."

In contrast, many commenters argued that the proposed six-month effective date should be retained in the final rule.

The Department has been persuaded by concerns raised by some of the commenters that the six month compliance date proposed in the NPRM for application of the 2010 Standards may be too short for certain projects that are already in the midst of the design and permitting process. The Department has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. This is consistent with the amount of time given when the 1991 regulation was published. Since many State and local building codes contain provisions that are consistent with 2004 ADAAG, the Department has decided that public accommodations that choose to comply with the 2010 Standards as defined in §36.104 before the compliance date will still be considered in compliance with the ADA. However, public accommodations that choose to comply with the 2010 Standards in lieu of the 1991 Standards prior to the compliance date described in this rule must choose one or the other standard, and may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standard.

Triggering event. In the NPRM, the Department proposed using the start of physical construction as the triggering event for ap-

plying the proposed standards to new construction under title III. This triggering event parallels that for the alterations provisions (*i.e.*, the date on which construction begins), and would apply clearly across all types of covered public accommodations. The Department also proposed that for prefabricated elements, such as modular buildings and amusement park rides and attractions, or installed equipment, such as ATMs, the start of construction means the date on which the site preparation begins. Site preparation includes providing an accessible route to the element.

The Department's NPRM sought public comment on how to define the start of construction and the practicality of applying commencement of construction as a triggering event. The Department also requested input on whether the proposed definition of the start of construction was sufficiently clear and inclusive of different types of facilities. The Department also sought input about facilities subject to title III for which commencement of construction would be ambiguous or problematic.

The Department received numerous comments recommending that the Department adopt a two-pronged approach to defining the triggering event. In those cases where permits are required, the Department should use "date of permit application" as the effective date triggering event, and if no permit is required, the Department should use "start of construction." A number of these commenters argued that the date of permit application is appropriate because the applicant would have to consider the applicable State and Federal accessibility standards in order to submit the designs usually required with the application. Moreover, the date of permit application is a typical triggering event in other code contexts, such as when jurisdictions introduce an updated building code. Some commenters expressed concern that using the date of "start of construction" was problematic because the date can be affected by factors that are outside the control of the owner. For example, an owner can plan construction to start before the new standards take effect and therefore use the 1991 Standards in the design. If permits are not issued in a timely manner, then the construction could be delayed until after the effective date, and then the project would have to be redesigned. This problem would be avoided if the permit application date was the triggering event. Two commenters expressed concern that the term "start of construction" is ambiguous, because it is unclear whether start of construction means the razing of structures on the site to make way for a new facility or means site preparation, such as regrading or laying the foundation.

One commenter recommended using the "signing date of a construction contract,"

and an additional commenter recommended that the new standards apply only to “buildings permitted after the effective date of the regulations.”

One commenter stated that for facilities that fall outside the building permit requirements (ATMs, prefabricated saunas, small sheds), the triggering event should be the date of installation, rather than the date the space for the facility is constructed.

The Department is persuaded by the comments to adopt a two-pronged approach to defining the triggering event for new construction and alterations. The final rule states that in those cases where permits are required, the triggering event shall be the date when the last application for a building permit application or permit extension is certified to be complete by a State, county, or local government, or in those jurisdictions where the government does not certify completion of applications, the date when the last application for a building permit or permit extension is received by the State, county, or local government. If no permits are required, then the triggering event shall be the “start of physical construction or alterations.” The Department has also added clarifying language related to the term “start of physical construction or alterations” to make it clear that “start of physical construction or alterations” is not intended to mean the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place.

Amusement rides. Section 234 of the 2010 Standards provides accessibility guidelines for newly designed and constructed amusement rides. The amusement ride provisions do not provide a “triggering event” for new construction or alteration of an amusement ride. An industry commenter requested that the triggering event of “first use” as noted in the Advisory note to section 234.1 of the 2004 ADAAG be included in the final rule. The Advisory note provides that “[a] custom designed and constructed ride is new upon its first use, which is the first time amusement park patrons take the ride.” The Department declines to treat amusement rides differently than other types of new construction and alterations and under the final rule, they are subject to §36.406(a)(3). Thus, newly constructed and altered amusement rides shall comply with the 2010 Standards if the start of physical construction or the alteration is on or after 18 months from the publication date of this rule. The Department also notes that section 234.4.2 of the 2010 Standards only applies where the structural or operational characteristics of an amusement ride are altered. It does not apply in cases where the only change to a ride is the theme.

Noncomplying new construction and alterations. The element-by-element safe harbor referenced in §36.304(d)(2) has no effect on

new or altered elements in existing facilities that were subject to the 1991 Standards on the date that they were constructed or altered, but do not comply with the technical and scoping specifications for those elements in the 1991 Standards. Section 36.406(a)(5) of the final rule sets forth the rules for non-compliant new construction or alterations in facilities that were subject to the requirements of this part. Under those provisions, noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012 shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards or the 2010 Standards. Noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012, shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

Section 36.406(b) Application of Standards to Fixed Elements

The final rule contains a new §36.406(b) that clarifies that the requirements established by this section, including those contained in the 2004 ADAAG, prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established elsewhere in this final rule. Although the Department has often chosen to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those coverage determinations fall within the discretionary authority of the Department.

The Department is also clarifying that the advisory notes, appendix notes, and figures that accompany the 1991 and 2010 Standards do not establish separately enforceable requirements unless otherwise specified in the text of the standards. This clarification has been made to address concerns expressed by ANPRM commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (*e.g.*, Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosings to make them more visible to individuals with low vision). The Department received no comments on this provision in the NPRM.

Section 36.406(c) Places of Lodging

In the NPRM, the Department proposed a new definition for public accommodations that are “places of lodging” and a new

§36.406(c) to clarify the scope of coverage for places of public accommodation that meet this definition. For many years the Department has received inquiries from members of the public seeking clarification of ADA coverage of rental accommodations in timeshares, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of public accommodation (as that term is now defined in §36.104). These facilities, which have attributes of both residential dwellings and transient lodging facilities, have become increasingly popular since the ADA's enactment in 1990 and make up the majority of new hotel construction in some vacation destinations. The hybrid residential and lodging characteristics of these new types of facilities, as well as their ownership characteristics, complicate determinations of ADA coverage, prompting questions from both industry and individuals with disabilities. While the Department has interpreted the ADA to encompass these hotel-like facilities when they are used to provide transient lodging, the regulation previously has specifically not addressed them. In the NPRM, the Department proposed a new §36.406(c), entitled "Places of Lodging," which was intended to clarify that places of lodging, including certain timeshares, condominium hotels, and mixed-use and corporate hotel facilities, shall comply with the provisions of the proposed standards, including, but not limited to, the requirements for transient lodging in sections 224 and 806 of the 2004 ADAAG.

The Department's NPRM sought public input on this proposal. The Department received a substantial number of comments on these issues from industry representatives, advocates for persons with disabilities, and individuals. A significant focus of these comments was on how the Department should define and regulate vacation rental units in timeshares, vacation communities, and condo-hotels where the units are owned and controlled by individual owners and rented out some portion of time to the public, as compared to traditional hotels and motels that are owned, controlled, and rented to the public by one entity.

Scoping and technical requirements applicable to "places of lodging." In the NPRM, the Department asked for public comment on its proposal in §36.406(c) to apply to places of lodging the scoping and technical requirements for transient lodging, rather than the scoping and technical requirements for residential dwelling units.

Commenters generally agreed that the transient lodging requirements should apply to places of lodging. Several commenters stated that the determination as to which requirements apply should be made based on the intention for use at the time of design and construction. According to these commenters, if units are intended for transient

rentals, then the transient lodging standards should apply, and if they are intended to be used for residential purposes, the residential standards should apply. Some commenters agreed with the application of transient lodging standards to places of lodging in general, but disagreed about the characterization of certain types of facilities as covered places of lodging.

The Department agrees that the scoping and technical standards applicable to transient lodging should apply to facilities that contain units that meet the definition of "places of lodging."

Scoping for timeshare or condominium hotels. In the NPRM, the Department sought comment on the appropriate basis for determining scoping for a timeshare or condominium-hotel. A number of commenters indicated that scoping should be based on the usage of the facility. Only those units used for short-term stays should be counted for application of the transient lodging standards, while units sold as residential properties should be treated as residential units not subject to the ADA. One commenter stated that scoping should be based on the maximum number of sleeping units available for public rental. Another commenter pointed out that unlike traditional hotels and motels, the number of units available for rental in a facility or development containing individually owned units is not fixed over time. Owners have the right to participate in a public rental program some, all, or none of the time, and individual owner participation changes from year to year.

The Department believes that the determination for scoping should be based on the number of units in the project that are designed and constructed with the intention that their owners may participate in a transient lodging rental program. The Department cautions that it is not the number of owners that actually exercise their right to participate in the program that determines the scoping. Rather it is the units that could be placed into an on-site or off-site transient lodging rental program. In the final rule, the Department has added a provision to §36.406(c)(3), which states that units intended to be used exclusively for residential purposes that are contained in facilities that also meet the definition of place of lodging are not covered by the transient lodging standards. Title III of the ADA does not apply to units designed and constructed with the intention that they be rented or sold as exclusively residential units. Such units are covered by the Fair Housing Act (FHA), which contains requirements for certain features of accessible and adaptable design both for units and for public and common use areas. All units designed and constructed with the intention that they may be used for both residential and transient lodging purposes are covered by the ADA and must be

counted for determining the required number of units that must meet the transient lodging standards in the 2010 Standards. Public use and common use areas in facilities containing units subject to the ADA also must meet the 2010 Standards. In some developments, units that may serve as residential units some of the time and rental units some of the time will have to meet both the FHAct and the ADA requirements. For example, all of the units in a vacation condominium facility whose owners choose to rent to the public when they are not using the units themselves would be counted for the purposes of determining the appropriate number of units that must comply with the 2010 Standards. In a newly constructed condominium that has three floors with units dedicated to be sold solely as residential housing and three floors with units that may be used as residences or hotel units, only the units on the three latter floors would be counted for applying the 2010 Standards. In a newly constructed timeshare development containing 100 units, all of which may be made available to the public through an exchange or rental program, all 100 units would be counted for purposes of applying the 2010 Standards.

One commenter also asked the Department for clarification of how to count individually owned "lock-off units." Lock-off units are units that are multi-bedroom but can be "locked off" into two separate units, each having individual external access. This commenter requested that the Department state in the final rule that individually owned lock-off units do not constitute multiple guest rooms for purposes of calculating compliance with the scoping requirements for accessible units, since for the most part the lock-off units are used as part of a larger accessible unit, and portions of a unit not locked off would constitute both an accessible one-bedroom unit or an accessible two-bedroom unit with the lock-off unit.

It is the Department's view that lock-off units that are individually owned that can be temporarily converted into two units do not constitute two separate guest rooms for purposes of calculating compliance with the scoping requirements.

One commenter asked the Department how developers should scope units where buildings are constructed in phases over a span of years, recommending that the scoping be based on the total number of units expected to be constructed at the project and not on a building-by-building basis or on a phase-by-phase basis. The Department does not think scoping should be based on planned number of units, which may or may not be actually constructed over a period of years. However, the Department recognizes that resort developments may contain buildings and facilities that are of all sizes from single-unit cottages to facilities with hundreds

of units. The Department believes it would be appropriate to allow designers, builders, and developers to aggregate the units in facilities with 50 or fewer units that are subject to a single permit application and that are on a common site or that are constructed at the same time for the purposes of applying the scoping requirements in table 224.2. Facilities with more than 50 units should be scoped individually in accordance with the table. The regulation has been revised to reflect this application of the scoping requirements.

One commenter also asked the Department to use the title III regulation to declare that timeshares subject to the transient lodging standards are exempt from the design and construction requirements of the FHAct. The coverage of the FHAct is set by Congress and interpreted by regulations issued by the Department of Housing and Urban Development. The Department has no authority to exempt anyone from coverage of the FHAct.

Application of ADA to places of lodging that contain individually owned units. The Department believes that regardless of ownership structure for individual units, rental programs (whether they are on- or off-site) that make transient lodging guest rooms available to the public must comply with the general nondiscrimination requirements of the ADA. In addition, as provided in §36.406(c), newly constructed facilities that contain accommodations intended to be used for transient lodging purposes must comply with the 2010 Standards.

In the NPRM, the Department asked for public comment on several issues related to ensuring the availability of accessible units in a rental program operated by a place of lodging. The Department sought input on how it could address a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program; whether the facility has an obligation to encourage or require owners of accessible units to participate in the rental program; and whether the facility developer, the condominium association, or the hotel operator has an obligation to retain ownership or control over a certain number of accessible units to avoid this problem.

In the NPRM, the Department sought public input on how to regulate scoping for a timeshare or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging, and how the condominium association, operator, or developer should determine which units to make accessible.

A number of commenters expressed concerns about the ability of the Department to

require owners of accessible units to participate in the rental program, to require developers, condo associations, or homeowners associations to retain ownership of accessible units, and to impose accessibility requirements on individual owners who choose to place inaccessible units into a rental program after purchase. These commenters stated that individuals who purchase accessible vacation units in condominiums, individual vacation homes, and timeshares have ownership rights in their units and may choose lawfully to make their units available to the public some, all, or none of the time. Commenters advised the Department that the Securities and Exchange Commission takes the position that if condominium units are offered in connection with participation in a required rental program for any part of the year, require the use of an exclusive rental agent, or impose conditions otherwise restricting the occupancy or rental of the unit, then that offering will be viewed as an offering of securities in the form of an investment (rather than a real estate offering). SEC Release No. 33-5347, Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development (Jan. 4, 1973). Consequently, most condominium developers do not impose such restrictions at the time of sale. Moreover, owners who choose to rent their units as a short-term vacation rental can select any rental or management company to lease and manage their unit, or they may rent them out on their own. They also may choose never to lease those units. Thus, there are no guarantees that at any particular time, accessible units will be available for rental by the public. According to this commenter, providing incentives for owners of accessible units to place their units in the rental program will not work, because it does not guarantee the availability of the requisite number of rooms dispersed across the development, and there is not any reasonable, identifiable source of funds to cover the costs of such incentives.

A number of commenters also indicated that it potentially is discriminatory as well as economically infeasible to require that a developer hold back the accessible units so that the units can be maintained in the rental program year-round. One commenter pointed out that if a developer did not sell the accessible condominiums or timeshares in the building inventory, the developer would be subject to a potential ADA or FHAct complaint because persons with disabilities who wanted to buy accessible units rather than rent them each year would not have the option to purchase them. In addition, if a developer held back accessible units, the cost of those units would have to be spread across all the buyers of the inaccessible units, and in many cases would make the project financially infeasible. This

would be especially true for smaller projects. Finally, this commenter argued that requiring units to be part of the common elements that are owned by all of the individual unit owners is infeasible because the common ownership would result in pooled rental income, which would transform the owners into participants in a rental pool, and thus turn the sale of the condominiums into the sale of securities under SEC Release 33-5347.

Several commenters noted that requiring the operator of the rental program to own the accessible units is not feasible either because the operator of the rental program would have to have the funds to invest in the purchase of all of the accessible units, and it would not have a means of recouping its investment. One commenter stated that in Texas, it is illegal for on-site rental programs to own condominium units. Another commenter noted that such a requirement might lead to the loss of on-site rental programs, leaving owners to use individual third-party brokers, or rent the units privately. One commenter acknowledged that individual owners cannot be required to place their units in a rental pool simply to offer an accessible unit to the public, since the owners may be purchasing units for their own use. However, this commenter recommended that owners who choose to place their units in a rental pool be required to contribute to a fund that would be used to renovate units that are placed in the rental pool to increase the availability of accessible units. One commenter argued that the legal entity running the place of lodging has an obligation to retain control over the required number of accessible units to ensure that they are available in accordance with title III.

A number of commenters also argued that the Department has no legal authority to require individual owners to engage in barrier removal where an existing development adds a rental program. One commenter stated that Texas law prohibits the operator of on-site rental program from demanding that alterations be made to a particular unit. In addition, under Texas law, condominium declarations may not require some units and not others to make changes, because that would lead to unequal treatment of units and owners, which is not permissible.

One commenter stated that since it was not possible for operators of rental programs offering privately owned condominiums to comply with accessible scoping, the Department should create exemptions from the accessible scoping, especially for existing facilities. In addition, this commenter stated that if an operator of an on-site rental program were to require renovations as a condition of participation in the rental program, unit owners might just rent their units through a different broker or on their own,

in which case such requirements would not apply.

A number of commenters argued that if a development decides to create a rental program, it must provide accessible units. Otherwise the development would have to ensure that units are retrofitted. A commenter argued that if an existing building is being converted, the Department should require that if alterations of the units are performed by an owner or developer prior to sale of the units, then the alterations requirements should apply, in order to ensure that there are some accessible units in the rental pool. This commenter stated that because of the proliferation of these type of developments in Hawaii, mandatory alteration is the only way to guarantee the availability of accessible units in the long run. In this commenter's view, since conversions almost always require makeover of existing buildings, this will not lead to a significant expense.

The Department agrees with the commenters that it would not be feasible to require developers to hold back or purchase accessible units for the purposes of making them available to the public in a transient lodging rental program, nor would it be feasible to require individual owners of accessible units to participate in transient lodging rental programs.

The Department recognizes that places of lodging are developed and financed under myriad ownership and management structures and agrees that there will be circumstances where there are legal barriers to requiring compliance with either the alterations requirements or the requirements related to barrier removal. The Department has added an exception to §36.406(c), providing that in existing facilities that meet the definition of places of lodging, where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners, the units are not subject to the alterations requirement, even where the owner rents the unit out to the public through a transient lodging rental program. In addition, the Department has added an exception to the barrier removal requirements at §36.304(g) providing that in existing facilities that meet the definition of places of lodging, where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners, the units are not subject to the barrier removal requirement. The Department notes, however, that there are legal relationships for some timeshares and cooperatives where the ownership interests do not convey control over the physical features of units. In those cases, it may be the case that the facility has an

obligation to meet the alterations or barrier removal requirements or to maintain accessible features.

Section 36.406(d) Social Service Center Establishments

In the NPRM, the Department proposed a new §36.406(d) requiring group homes, halfway houses, shelters, or similar social service center establishments that provide temporary sleeping accommodations or residential dwelling units to comply with the provisions of the 2004 ADAAG that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

The NPRM explained that this proposal was based on two important changes in the 2004 ADAAG. First, for the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the 2004 ADAAG eliminates the language contained in the 1991 Standards addressing scoping and technical requirements for homeless shelters, group homes, and similar social service center establishments. Currently, such establishments are covered in section 9.5 of the transient lodging section of the 1991 Standards. The deletion of section 9.5 creates an ambiguity of coverage that must be addressed.

The NPRM explained the Department's belief that transferring coverage of social service center establishments from the transient lodging standards to the residential facilities standards would alleviate conflicting requirements for social service providers. The Department believes that a substantial percentage of social service providers are recipients of Federal financial assistance from the Department of Housing and Urban Development (HUD). The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, they are covered both by the ADA and section 504. UFAS is currently the design standard for new construction and alterations for entities subject to section 504. The two design standards for accessibility—the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential facilities standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential facilities standards, which would

harmonizes the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements: coverage under the residential facilities standards.

In the NPRM, the Department expressed concern that the residential facilities standards do not include a requirement for clear floor space next to beds similar to the requirement in the transient lodging standards; as a result, the Department proposed adding a provision that would require certain social service center establishments that provide sleeping rooms with more than 25 beds to ensure that a minimum of 5 percent of the beds have clear floor space in accordance with section 806.2.3 of the 2004 ADAAG.

The Department requested information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service center establishments, and from the clients of these facilities who would be affected by this proposed change. In the NPRM, the Department asked to what extent conflicts between the ADA and section 504 have affected these facilities and what the effect would be of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms.

Many of the commenters supported applying the residential facilities requirements to social service center establishments stating that even though the residential facilities requirements are less demanding, in some instances, the existence of one clear standard will result in an overall increased level of accessibility by eliminating the confusion and inaction that are sometimes caused by the current existence of multiple requirements. One commenter stated that the residential facilities guidelines were more appropriate because individuals housed in social service center establishments typically stay for a prolonged period of time, and guests of a transient lodging facility typically are not housed to participate in a program or receive services.

One commenter opposed to the proposed section argued for the application of the transient lodging standards to all social service center establishments except those that were “intended as a person’s place of abode,” referencing the Department’s question related to the definition of place of lodging in the title III NPRM. A second commenter stated that the use of transient lodging guidelines would lead to greater accessibility.

The Department continues to be concerned about alleviating the challenges for social service providers that are also subject to section 504 and that would likely be subject to conflicting requirements if the transient lodging standard were applied. Thus, the Department has retained the requirement that

social service center establishments comply with the residential dwelling standards. The Department did not receive comments regarding adding a requirement for bathing options, such as a roll-in shower, in social service center establishments operated by public accommodations. The Department did, however, receive comments in support of adding such a requirement regarding public entities under title II. The Department believes that social service center establishments that provide emergency shelter to large transient populations should be able to provide bathing facilities that are accessible to persons with mobility disabilities who need roll-in showers. Because of the transient nature of the population of these large shelters, it will not be feasible to modify bathing facilities in a timely manner when faced with a need to provide a roll-in shower with a seat when requested by an overnight visitor. As a result, the Department has added a requirement that social service center establishments with sleeping accommodations for more than 50 individuals must provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower must be provided for each group. This supplemental requirement to the residential facilities standards is in addition to the supplemental requirement that was proposed in the NPRM for clear floor space in sleeping rooms with more than 25 beds.

The Department also notes that while dwelling units at some social service center establishments are also subject to FHAct design and construction requirements that require certain features of adaptable and accessible design, FHAct units do not provide the same level of accessibility that is required for residential facilities under the 2010 Standards. The FHAct requirements, where also applicable, should not be considered a substitute for the 2010 Standards. Rather, the 2010 Standards must be followed in addition to the FHAct requirements.

The Department also notes that while in the NPRM the Department used the term “social service establishment,” the final rule uses the term “social service center establishment.” The Department has made this editorial change so that the final rule is consistent with the terminology used in the ADA. *See* 42 U.S.C. 12181(7)(K).

Section 36.406(e) Housing at a Place of Education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in

postsecondary educational settings, including architectural features. Housing types in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to title III of the ADA, universities and schools that are recipients of Federal financial assistance also are subject to section 504, which contains its own accessibility requirements currently through the application of UFAS. Residential housing, including housing in an educational setting, is also covered by the FHAct, which requires newly constructed multifamily housing to include certain features of accessible and adaptable design. Covered entities subject to the ADA must always be aware of, and comply with, any other Federal statutes or regulations that govern the operation of residential properties.

Although the 1991 Standards mention dormitories as a form of transient lodging, they do not specifically address how the ADA applies to dormitories and other types of residential housing provided in an educational setting. The 1991 Standards also do not contain any specific provisions for residential facilities, allowing covered entities to elect to follow the residential standards contained in UFAS. Although the 2004 ADAAG contains provisions for both residential facilities and transient lodging, the guidelines do not indicate which requirements apply to housing provided in an educational setting, leaving it to the adopting agencies to make that choice. After evaluating both sets of standards, the Department concluded that the benefits of applying the transient lodging standards outweighed the benefits of applying the residential facilities standards. Consequently, in the NPRM, the Department proposed a new §36.406(e) that provided that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG.

Private universities and schools covered by title III as public accommodations are required to make their programs and activities accessible to persons with disabilities. The housing facilities that they provide have varied characteristics. College and university housing facilities typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they often are used for short-term stays of one to three days, a week, or several months. Graduate and faculty housing often is provided year-round in the form of apartments, which may serve individuals or families with children. These housing facilities are diverse in their layout. Some are double-occupancy rooms with a shared toilet and bathing room, which may be inside or outside the unit. Others may contain cluster,

suite, or group arrangements where several rooms are located inside a defined unit with bathing, kitchen, and similar common facilities. In some cases, these suites are indistinguishable in features from traditional apartments. Universities may build their own housing facilities or enter into agreements with private developers to build, own, or lease housing to the educational institution or to its students. Academic housing may be located on the campus of the university or may be located in nearby neighborhoods.

Throughout the school year and the summer, academic housing can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public use and common use areas is an essential part of having access to these educational programs and activities. Academic housing also is used for short-term transient educational programs during the time students are not in regular residence and may be rented out to transient visitors in a manner similar to a hotel for special university functions.

The Department was concerned that applying the new construction requirements for residential facilities to educational housing facilities could hinder access to educational programs for students with disabilities. Elevators generally are not required under the 2004 ADAAG residential facilities standards unless they are needed to provide an accessible route from accessible units to public use and common use areas, while under the 2004 ADAAG as it applies to other types of facilities, multistory private facilities must have elevators unless they meet very specific exceptions. In addition, the residential facilities standards do not require accessible roll-in showers in bathrooms, while the transient lodging requirements require some of the accessible units to be served by bathrooms with roll-in showers. The transient lodging standards also require that a greater number of units have accessible features for persons with communication disabilities. The transient lodging standards provide for installation of the required accessible features so that they are available immediately, but the residential facilities standards allow for certain features of the unit to be adaptable. For example, only reinforcements for grab bars need to be provided in residential dwellings, but the actual grab bars must be installed under the transient lodging standards. By contrast, the residential facilities standards do require certain features that provide greater accessibility within units, such as usable kitchens and an accessible route throughout the dwelling. The residential facilities standards also require 5 percent of the units to be accessible to persons with mobility disabilities, which

is a continuation of the same scoping that is currently required under UFAS and is therefore applicable to any educational institution that is covered by section 504. The transient lodging standards require a lower percentage of accessible sleeping rooms for facilities with large numbers of rooms than is required by UFAS. For example, if a dormitory has 150 rooms, the transient lodging standards would require 7 accessible rooms, while the residential standards would require 8. In a large dormitory with 500 rooms, the transient lodging standards would require 13 accessible rooms, and the residential facilities standards would require 25. There are other differences between the two sets of standards, including requirements for accessible windows, alterations, kitchens, an accessible route throughout a unit, and clear floor space in bathrooms allowing for a side transfer.

In the NPRM, the Department requested public comment on how to scope educational housing facilities, and it asked whether the residential facilities requirements or the transient lodging requirements in the 2004 ADAAG would be more appropriate for housing at places of education and asked how the different requirements would affect the cost of building new dormitories and other student housing. *See* 73 FR 34508, 34545 (June 17, 2008).

The Department received several comments on this issue under title III. One commenter stated that the Department should adopt the residential facilities standards for housing at a place of education. In the commenter's view, the residential facilities standards are congruent with overlapping requirements imposed by HUD, and the residential facilities requirements would ensure dispersion of accessible features more effectively. This commenter also argued that while the increased number of required accessible units for residential facilities as compared to transient lodging may increase the cost of construction or alteration, this cost would be offset by a reduced need later to adapt rooms if the demand for accessible rooms exceeds the supply. The commenter also encouraged the Department to impose a visitability (accessible doorways and necessary clear floor space for turning radius) requirement for both the residential facilities and transient lodging requirements to allow students with mobility impairments to interact and socialize in a fully integrated fashion. Another commenter stated that while dormitories should be treated like residences as opposed to transient lodging, the Department should ensure that "all floors are accessible," thus ensuring community integration and visitability. Another commenter argued that housing at a place of education is comparable to residential housing, and that most of the housing types used by schools do not have the same amenities

and services or function like transient lodging and should not be treated as such.

Several commenters focused on the length of stay at this type of housing and suggested that if the facilities are subject to occupancy for greater than 30 days, the residential standards should apply. Another commenter supported the Department's adoption of the transient lodging standards, arguing this will provide greater accessibility and therefore increase opportunities for students with disabilities to participate. One commenter, while supporting the use of transient lodging standards in this area, argued that the Department also should develop regulations relating to the usability of equipment in housing facilities by persons who are blind or visually impaired. Another commenter argued that the Department should not impose the transient lodging requirements on K–12 schools because the cost of adding elevators can be prohibitive, and because there are safety concerns related to evacuating students in wheelchairs living on floors above the ground floor in emergencies causing elevator failures.

The Department has considered the comments recommending the use of the residential facilities standards and acknowledges that they require certain features that are not included in the transient lodging standards and that should be required for housing provided at a place of education. In addition, the Department notes that since educational institutions often use their academic housing facilities as short-term transient lodging in the summers, it is important that accessible features be installed at the outset. It is not realistic to expect that the educational institution will be able to adapt a unit in a timely manner in order to provide accessible accommodations to someone attending a one-week program during the summer.

The Department has determined that the best approach to this type of housing is to continue to require the application of transient lodging standards but, at the same time, to add several requirements drawn from the residential facilities standards related to accessible turning spaces and work surfaces in kitchens, and the accessible route throughout the unit. This will ensure the maintenance of the transient lodging standard requirements related to access to all floors of the facility, roll-in showers in facilities with more than 50 sleeping rooms, and other important accessibility features not found in the residential facilities standards, but also will ensure usable kitchens and access to all the rooms in a suite or apartment.

The Department has added a new definition to §36.104, "Housing at a Place of Education," and has revised §36.406(e) to reflect the accessible features that now will be required in addition to the requirements set forth under the transient lodging standards.

The Department also recognizes that some educational institutions provide some residential housing on a year-round basis to graduate students and staff that is comparable to private rental housing but contains no facilities for educational programming. Section 36.406(e)(3) exempts from the transient lodging standards apartments or townhouse facilities that are provided with a lease on a year-round basis exclusively to graduate students or faculty and that do not contain any public use or common use areas available for educational programming; instead, such housing must comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

The regulatory text uses the term “sleeping room” in lieu of the term “guest room,” which is the term used in the transient lodging standards. The Department is using this term because it believes that for the most part, it provides a better description of the sleeping facilities used in a place of education than “guest room.” The final rule states in §36.406(e) that the Department intends the terms to be used interchangeably in the application of the transient lodging standards to housing at a place of education.

Section 36.406(f) Assembly Areas

In the NPRM, the Department proposed §36.406(f) to supplement the assembly area requirements of the 2004 ADAAG, which the Department is adopting as part of the 2010 Standards. The NPRM proposed at §36.406(f)(1) to require wheelchair spaces and companion seating locations to be dispersed to all levels of the facility that are served by an accessible route. The Department received no significant comments on this paragraph and has decided to adopt the proposed language with minor modifications.

Section 36.406(f)(1) ensures that there is greater dispersion of wheelchair spaces and companion seats throughout stadiums, arenas, and grandstands than would otherwise be required by sections 221 and 802 of the 2004 ADAAG. In some cases, the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (*e.g.*, by stairs), but there is an accessible route that complies with section 206.3 of the 2004 ADAAG that could be connected to seats on the field, wheelchair spaces and companion seats must be placed on the field even if that route is not generally available to the public.

Regulatory language that was included in the 2004 ADAAG advisory, but that did not appear in the NPRM, has been added by the Department in §36.406(f)(2). Section 36.406(f)(2) now requires an assembly area that has seating encircling, in whole or in part, a field of play or performance area, such as an arena or stadium, to place wheelchair spaces and companion seats around the

entire facility. This rule, which is designed to prevent a public accommodation from placing wheelchair spaces and companion seats on one side of the facility only, is consistent with the Department’s enforcement practices and reflects its interpretation of section 4.33.3 of the 1991 Standards.

In the NPRM, the Department proposed §36.406(f)(2), which prohibits wheelchair spaces and companion seating locations from being “located on (or obstructed by) temporary platforms * * *.” 73 FR 34508, 34557 (June 17, 2008). Through its enforcement actions, the Department discovered that some venues place wheelchair spaces and companion seats on temporary platforms that, when removed, reveal conventional seating underneath, or cover the wheelchair spaces and companion seats with temporary platforms on top of which they place risers of conventional seating. These platforms cover groups of conventional seats and are used to provide groups of wheelchair seats and companion seats.

Several commenters requested an exception to the prohibition of the use of temporary platforms for public accommodations that sell most of their tickets on a season-ticket or other multi-event basis. Such commenters argued that they should be able to use temporary platforms because they know, in advance, that the patrons sitting in certain areas for the whole season do not need wheelchair spaces and companion seats. The Department declines to adopt such an exception. As it explained in detail in the NPRM, the Department believes that permitting the use of movable platforms that seat four or more wheelchair users and their companions have the potential to reduce the number of available wheelchair seating spaces below the level required, thus reducing the opportunities for persons who need accessible seating to have the same choice of ticket prices and amenities that are available to other patrons in the facility. In addition, use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of accessible seating will be lost when a platform is removed. See 73 FR 34508, 34546 (June 17, 2008). Further, use of temporary platforms allows facilities to limit persons who need accessible seating to certain seating areas, and to relegate accessible seating to less desirable locations. The use of temporary platforms has the effect of neutralizing dispersion and other seating requirements (*e.g.*, line of sight) for wheelchair spaces and companion seats. *Cf. Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1171 (D. Or. 1998) (holding that while a public accommodation may “infill” wheelchair spaces with removable seats when the wheelchair spaces are not needed to accommodate individuals with disabilities, under certain circumstances “[s]uch a

practice might well violate the rule that wheelchair spaces must be dispersed throughout the arena in a manner that is roughly proportionate to the overall distribution of seating”). In addition, using temporary platforms to convert unsold wheelchair spaces to conventional seating undermines the flexibility facilities need to accommodate secondary ticket market exchanges as required by §36.302(f)(7) of the final rule.

As the Department explained in the NPRM, however, this provision was not designed to prohibit temporary seating that increases seating for events (*e.g.*, placing temporary seating on the floor of a basketball court for a concert). Consequently, the final rule, at §36.406(f)(3), has been amended to clarify that if an entire seating section is on a temporary platform for a particular event, then wheelchair spaces and companion seats may also be in that seating section. However, adding a temporary platform to create wheelchair spaces and companion seats that are otherwise dissimilar from nearby fixed seating and then simply adding a small number of additional seats to the platform would not qualify as an “entire seating section” on the platform. In addition, §36.406(f)(3) clarifies that facilities may fill in wheelchair spaces with removable seats when the wheelchair spaces are not needed by persons who use wheelchairs.

The Department has been responsive to assembly areas’ concerns about reduced revenues due to unused accessible seating. Accordingly, the Department has reduced scoping requirements significantly—by almost half in large assembly areas—and determined that allowing assembly areas to infill unsold wheelchair spaces with readily removable temporary individual seats appropriately balances their economic concerns with the rights of individuals with disabilities. See section 221.1 of the 2010 Standards.

For stadium-style movie theaters, in §36.406(f)(4) of the NPRM the Department proposed requiring placement of wheelchair seating spaces and companion seats on a riser or cross-aisle in the stadium section of the theater that satisfies at least one of the following criteria: (1) It is located within the rear 60 percent of the seats provided in the auditorium; or (2) It is located within the area of the auditorium where the vertical viewing angles are between the 40th and 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The vertical viewing angle is the angle between a horizontal line perpendicular to the seated viewer’s eye to the screen and a line from the seated viewer’s eye to the top of the screen.

The Department proposed this bright-line rule for two reasons: (1) the movie theater industry petitioned for such a rule; and (2)

the Department has acquired expertise in the design of stadium-style theaters during its litigation with several major movie theater chains. See *United States v. AMC Entertainment, Inc.*, 232 F. Supp.2d 1092 (C.D. Cal. 2002), *rev’d in part*, 549 F.3d 760 (9th Cir. 2008); *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003). Two industry commenters—at least one of whom otherwise supported this rule—requested that the Department explicitly state that this rule does not apply retroactively to existing theaters. Although this provision on its face applies to new construction and alterations, these commenters were concerned that the rule could be interpreted to apply retroactively because of the Department’s statements in the NPRM and ANPRM that this bright line rule, although newly articulated, is not a new standard but “merely codifi[es] long-standing Department requirement[s].” 73 FR 34508, 34534 (June 17, 2008), and does not represent a “substantive change from the existing line-of-sight requirements” of section 4.33.3 of the 1991 Standards, 69 FR 58768, 58776 (Sept. 30, 2004).

Although the Department intends for §36.406(f)(4) of this rule to apply prospectively to new construction and alterations, this rule is not a departure from, and is consistent with, the line-of-sight requirements in the 1991 Standards. The Department has always interpreted the line-of-sight requirements in the 1991 Standards to require viewing angles provided to patrons who use wheelchairs to be comparable to those afforded to other spectators. Section 36.406(f)(4) merely represents the application of these requirements to stadium-style movie theaters.

One commenter from a trade association sought clarification whether §36.406(f)(4) applies to stadium-style theaters with more than 300 seats, and argued that it should not since dispersion requirements apply in those theaters. The Department declines to limit this rule to stadium-style theaters with 300 or fewer seats; stadium-style theaters of all sizes must comply with this rule. So, for example, stadium-style theaters that must vertically disperse wheelchair spaces and companion seats must do so within the parameters of this rule.

The NPRM included a provision that required assembly areas with more than 5,000 seats to provide at least five wheelchair spaces with at least three companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating is better addressed through ticketing policies rather than design and has deleted that provision from this section of the final rule.

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Section 36.406(g) Medical Care Facilities

In the 1991 title III regulation, there was no provision addressing the dispersion of accessible sleeping rooms in medical care facilities. The Department is aware, however, of problems that individuals with disabilities face in receiving full and equal medical care when accessible sleeping rooms are not adequately dispersed. When accessible rooms are not fully dispersed, a person with a disability is often placed in an accessible room in an area that is not medically appropriate for his or her condition, and is thus denied quick access to staff with expertise in that medical specialty and specialized equipment. While the Access Board did not establish specific design requirements for dispersion in the 2004 ADAAG, in response to extensive comments in support of dispersion it added an advisory note, Advisory 223.1 General, encouraging dispersion of accessible rooms within the facility so that accessible rooms are more likely to be proximate to appropriate qualified staff and resources.

In the NPRM, the Department sought additional comment on the issue, asking whether it should require medical care facilities, such as hospitals, to disperse their accessible sleeping rooms, and if so, by what method (by specialty area, floor, or other criteria). All of the comments the Department received on this issue supported dispersing accessible sleeping rooms proportionally by specialty area. These comments from individuals, organizations, and a building code association, argued that it would not be difficult for hospitals to disperse rooms by specialty area, given the high level of regulation to which hospitals are subject and the planning that hospitals do based on utilization trends. Further, comments suggest that without a requirement, it is unlikely that hospitals would disperse the rooms. In addition, concentrating accessible rooms in one area perpetuates segregation of individuals with disabilities, which is counter to the purpose of the ADA.

The Department has decided to require medical care facilities to disperse their accessible sleeping rooms in a manner that is proportionate by type of medical specialty. This does not require exact mathematical proportionality, which at times would be impossible. However, it does require that medical care facilities disperse their accessible rooms by medical specialty so that persons with disabilities can, to the extent practical, stay in an accessible room within the wing or ward that is appropriate for their medical needs. The language used in this rule (“in a manner that is proportionate by type of medical specialty”) is more specific than that used in the NPRM (“in a manner that enables patients with disabilities to have access to appropriate specialty services”) and adopts the concept of proportionality pro-

posed by the commenters. Accessible rooms should be dispersed throughout all medical specialties, such as obstetrics, orthopedics, pediatrics, and cardiac care.

SUBPART F—CERTIFICATION OF STATE LAWS OR LOCAL BUILDING CODES

Subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that on the application of a State or local jurisdiction, the Attorney General may certify that a State or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements. In its NPRM, the Department proposed three changes in subpart F that would streamline the process for public entities seeking certification, all of which are adopted in this final rule.

First, the Department proposed deleting the existing §36.603, which establishes the obligations of a submitting authority that is seeking certification of its code, and issue in its place informal regulatory guidance regarding certification submission requirements. Due to the deletion of §36.603, §§36.604 through 36.608 are renumbered, and §36.603 in the final rule is modified to indicate that the Assistant Attorney General for the Civil Rights Division (Assistant Attorney General) shall make a preliminary determination of equivalency after “receipt and review of all information relevant to a request filed by a submitting official for certification of a code.” Second, the Department proposed that the requirement in renumbered §36.604 (previously §36.605) that an informal hearing be held in Washington, DC, if the Assistant Attorney General makes a preliminary determination of equivalency be changed to a requirement that the hearing be held in the State or local jurisdiction charged with administration and enforcement of the code. Third, the Department proposed adding language to renumbered §36.606 (previously §36.607) to explain the effect of the 2010 Standards on the codes of State or local jurisdictions that were determined in the past to meet or exceed the 1991 Standards. Once the 2010 Standards take effect, certifications issued under the 1991 Standards would not have any future effect, and States and local jurisdictions with codes certified under the 1991 Standards would need to reapply for certification under the 2010 Standards. With regard to elements of existing buildings and facilities constructed in compliance with a code when a certification of equivalency was in effect, the final rule requires that in any enforcement action this compliance would be treated as rebuttable evidence of compliance with the standards then in effect. The new

provision added to §36.606 may also have implications in determining an entity's eligibility for the element-by-element safe harbor.

No substantive comments were received regarding the Department's proposed changes in subpart F, and no other changes have been made to this subpart in the final rule. The Department did receive several comments addressing other issues raised in the NPRM that are related to subpart F. Because the 2010 Standards include specific design requirements for recreation facilities and play areas that may be new to many title III facilities, the Department sought comments in the NPRM about how the certification review process would be affected if the State or local jurisdiction allocates the authority to implement the new requirements to State or local agencies that are not ordinarily involved in administering building codes. One commenter, an association of building owners and managers, suggested that because of the increased scope of the 2010 Standards, it is likely that parts of covered elements in the new standards will be under the jurisdiction of multiple State or local agencies. In light of these circumstances, the commenter recommended that the Department allow State or local agencies to seek certification even if only one State or local regulatory agency requests certification. For example, if a State agency that regulates buildings seeks certification of its building code, it should be able to do so, even if another State agency that regulates amusement rides and miniature golf courses does not seek certification.

The Department's discussion of this issue in the NPRM contemplated that all of a State or local government's accessibility requirements for title III facilities would be the subject of a request for certification. Any other approach would require the Department to certify only part of a State or local government's accessibility requirements as compared to the entirety of the revised ADA standards. As noted earlier, the Attorney General is authorized by section 308(b)(1)(A)(ii) of the ADA to certify that a State or local building code meets or exceeds the ADA's minimum accessibility requirements, which are contained in this regulation. The Department has concluded that this is a decision that must be made on a case-by-case basis because of the wide variety of enforcement schemes adopted by the States. Piecemeal certification of laws or codes that do not contain all of the minimum accessibility requirements could fail to satisfy the Attorney General's responsibility to ensure that a State or local building code meets or exceeds the minimum accessibility requirements of the Act before granting certification. However, the Department wants to permit State and local code administrators to have maximum flexibility,

so the Department will leave open the possibility for case-by-case review to determine if a State has successfully met the burden of demonstrating that its accessibility codes or other laws meet or exceed the ADA requirements.

The commenter representing building owners and managers also urged the Department to extend the proposed effective date for the final rule. The commenter explained that a six-month phase-in period is inadequate for States to begin and complete a code amendment process. The commenter asserted that the inadequate phase-in period will place entities undertaking new construction and alterations, particularly in those States with certified codes, in a difficult position because State officials will continue to enforce previously certified State or local accessibility requirements that may be in conflict with the new 2010 Standards. The Department received numerous comments on the issue of the effective date, many of them similar to the concerns expressed above, in response to both the NPRM and the ANPRM. See Appendix A discussion of compliance dates for new construction and alterations (§36.406). The Department has been persuaded by the concerns raised by many commenters addressing the time and costs related to the design process for both new construction and alterations, and has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. For more information on the issue of the compliance date, refer to subpart D—New Construction and Alterations.

One commenter, an association of theater owners, recommended that the Department establish a training program for State building inspectors for those States that receive certification to ensure more consistent ADA compliance and to facilitate the review of builders' architectural plans. The commenter also recommended that State building inspectors, once trained, review architectural plans, and after completion and inspection of facilities, be authorized to certify that the inspected building or facility meets both the certified State and the Federal accessibility requirements. Although supportive of the idea of additional training for State and local building code officials regarding ADA compliance, the Department believes that the approach suggested by the commenter of allowing State and local code officials to determine if a covered facility is in compliance with Federal accessibility requirements is not consistent with or permissible under the statutory enforcement scheme established by the ADA. As the Department stated in the NPRM, certification of State and local codes serves, to some extent, to mitigate the absence of a Federal mechanism for conducting at the national

level a review of all architectural plans and inspecting all covered buildings under construction to ensure compliance with the ADA. In this regard, certification operates as a bridge between the obligation to comply with the 1991 Standards in new construction and alterations, and the administrative schemes of State and local governments that regulate the design and construction process. By ensuring consistency between State or local codes and Federal accessibility standards, certification has the additional benefit of streamlining the regulatory process, thereby making it easier for those in the design and construction industry to satisfy both State and Federal requirements. The Department notes, however, that although certification has the potential to increase compliance with the ADA, this result, however desirable, is not guaranteed. The ADA contemplated that there could be enforcement actions brought even in States with certified codes, and it provided some protection in litigation to builders who adhered to the provisions of the code certified to be ADA-equivalent. The Department's certification determinations make it clear that to get the benefit of certification, a facility must comply with the applicable code requirements—without relying on waivers or variances. The certified code, however, remains within the authority of the adopting State or local jurisdiction to interpret and enforce: Certification does not transform a State's building code into Federal law. Nor can certification alone authorize State and local building code officials implementing a certified code to do more than they are authorized to do under State or local law, and these officials cannot acquire authority through certification to render binding interpretations of Federal law. Therefore, the Department, while understanding the interest in obtaining greater assurance of compliance with the ADA through the interpretation and enforcement of a certified code by local code officials, declined in the NPRM to confer on local officials the authority not granted to them under the ADA to certify the compliance of individual facilities. The Department in the final rule finds no reason to alter its position on this issue in response to the comments that were received.

The commenter representing theater owners also urged the Department to provide a safe harbor to facilities constructed in compliance with State or local building codes certified under the 1991 Standards. With regard to elements of facilities constructed in compliance with a certified code prior to the effective date of the 2010 Standards, and during the period when a certification of equivalency was in effect, the Department noted in the NPRM that its approach would be consistent with the approach to the safe harbor discussed in subpart C, §36.304 of the NPRM, with respect to elements in existing facili-

ties constructed in compliance with the 1991 Standards. For example, elements in existing facilities in States with codes certified under the 1991 Standards would be eligible for a safe harbor if they were constructed in compliance with an ADA-certified code. In this scenario, compliance with the certified code would be treated as evidence of compliance with the 1991 Standards for purposes of determining the application of the safe harbor provision to those elements. For more information on safe harbor, refer to subpart C, §36.304 of the final rule.

One commenter, an advocacy group for the blind, suggested that, similar to the procedures for certifying a State or local building code, the Department should establish a program to certify an entity's obligation to make its goods and services accessible to persons with sensory disabilities. The Department believes that this commenter was suggesting that covered entities should be able to request that the Department review their business operations to determine if they have met their ADA obligations. As noted earlier, subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that on the application of a State or local jurisdiction, the Attorney General may certify that a State or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the ADA. The only mechanism through which the Department is authorized to ensure a covered entity's compliance with the ADA is the enforcement scheme established under section 308(b)(1)(A)(i) of the ADA. The Department notes, however, that title III of the ADA and its implementing regulation, which includes the standards for accessible design, already require existing, altered, and newly constructed places of public accommodation, such as retail stores, hotels, restaurants, movie theaters, and stadiums, to make their facilities readily accessible to and usable by individuals with disabilities, which includes individuals with sensory disabilities, so that individuals with disabilities have a full and equal opportunity to enjoy the benefits of a public accommodation's goods, services, facilities, privileges and advantages.

OTHER ISSUES

Questions Posed in the NPRM Regarding Costs and Benefits of Complying With the 2010 Standards

In the NPRM, the Department requested comments on various cost and benefit issues related to eight requirements in the Department's Initial RIA, that were projected to have incremental costs that exceeded monetized benefits by more than \$100 million when using the 1991 Standards as a comparative baseline, *i.e.*, side reach, water closet clearances in single-user toilet rooms with

in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses. 73 FR 34508, 34512 (June 17, 2008). The Department was particularly concerned about how these costs applied to alterations. The Department noted that pursuant to the ADA, the Department does not have statutory authority to modify the 2004 ADAAG and is required instead to issue regulations implementing the ADA that are consistent with the Board's guidelines. In that regard, the Department also requested comment about whether any of these eight elements in the 2010 Standards should be returned to the Access Board for further consideration, in particular as applied to alterations. Many of the comments received by the Department in response to these questions addressed both titles II and III. As a result, the Department's discussion of these comments and its response are collectively presented for both titles.

Side reach. The 1991 Standards at section 4.2.6 establish a maximum side-reach height of 54 inches. The 2010 Standards at section 308.3.1 reduce that maximum height to 48 inches. The 2010 Standards also add exceptions for certain elements to the scoping requirement for operable parts.

The vast majority of comments the Department received were in support of the lower side-reach maximum of 48 inches in the 2010 Standards. Most of these comments, but not all, were received from individuals of short stature, relatives of individuals of short stature, or organizations representing the interests of persons with disabilities, including individuals of short stature. Comments from individuals with disabilities and disability advocacy groups stated that the 48-inch side reach would permit independence in performing many activities of daily living for individuals with disabilities, including individuals of short stature, persons who use wheelchairs, and persons who have limited upper body strength. In this regard, one commenter who is a business owner pointed out that as a person of short stature there were many occasions when he was unable to exit a public restroom independently because he could not reach the door handle. The commenter said that often elevator control buttons are out of his reach, and, if he is alone, he often must wait for someone else to enter the elevator so that he can ask that person to press a floor button for him. Another commenter, who is also a person of short stature, said that he has on several occasions pulled into a gas station only to find that he was unable to reach the credit card reader on the gas pump. Unlike other customers who can reach the card reader, swipe their credit or debit cards, pump their gas, and leave the station, he must use another

method to pay for his gas. Another comment from a person of short stature pointed out that as more businesses take steps to reduce labor costs—a trend expected to continue—staffed booths are being replaced with automatic machines for the sale, for example, of parking tickets and other products. He observed that the “ability to access and operate these machines becomes ever more critical to function in society,” and, on that basis, urged the Department to adopt the 48-inch side-reach requirement. Another individual commented that persons of short stature should not have to carry with them adaptive tools in order to access building or facility elements that are out of their reach, any more than persons in wheelchairs should have to carry ramps with them in order to gain access to facilities.

Many of the commenters who supported the revised side-reach requirement pointed out that lowering the side-reach requirement to 48 inches would avoid a problem sometimes encountered in the built environment when an element was mounted for a parallel approach at 54 inches, only to find afterwards that a parallel approach was not possible. Some commenters also suggested that lowering the maximum unobstructed side reach to 48 inches would reduce confusion among design professionals by making the unobstructed forward and side-reach maximums the same (the unobstructed forward reach in both the 1991 and 2010 Standards is 48 inches maximum). These commenters also pointed out that the ICC/ANSI A117.1 Standard, which is a private sector model accessibility standard, has included a 48-inch maximum high side-reach requirement since 1998. Many jurisdictions have already incorporated this requirement into their building codes, which these commenters believed would reduce the cost of compliance with the 2010 Standards. Because numerous jurisdictions have already adopted the 48-inch side-reach requirement, the Department's failure to adopt the 48-inch side-reach requirement in the 2010 Standards, in the view of many commenters, would result in a significant reduction in accessibility, and would frustrate efforts that have been made to harmonize private sector model construction and accessibility codes with Federal accessibility requirements. Given these concerns, they overwhelmingly opposed the idea of returning the revised side-reach requirement to the Access Board for further consideration.

The Department also received comments in support of the 48-inch side-reach requirement from an association of professional commercial property managers and operators and from State governmental entities. The association of property managers pointed out that the revised side-reach requirement provided a reasonable approach to “regulating elevator controls and all other operable parts” in existing facilities in light

of the manner in which the safe harbor, barrier removal, and alterations obligations will operate in the 2010 Standards. One governmental entity, while fully supporting the 48-inch side-reach requirement, encouraged the Department to adopt an exception to the lower reach range for existing facilities similar to the exception permitted in the ICC/ANSI A117.1 Standard. In response to this latter concern, the Department notes that under the safe harbor, existing facilities that are in compliance with the 1991 Standards, which required a 54-inch side-reach maximum, would not be required to comply with the lower side-reach requirement, unless there is an alteration. *See* § 36.304(d)(2)(i).

A number of commenters expressed either concern with, or opposition to, the 48-inch side-reach requirement and suggested that it be returned to the Access Board for further consideration. These commenters included trade and business associations, associations of retail stores, associations of restaurant owners, retail and convenience store chains, and a model code organization. Several businesses expressed the view that the lower side-reach requirement would discourage the use of their products and equipment by most of the general public. In particular, concerns were expressed by a national association of pay phone service providers regarding the possibility that pay telephones mounted at the lower height would not be used as frequently by the public to place calls, which would result in an economic burden on the pay phone industry. The commenter described the lower height required for side reach as creating a new "barrier" to pay phone use, which would reduce revenues collected from pay phones and, consequently, further discourage the installation of new pay telephones. In addition, the commenter expressed concern that phone service providers would simply decide to remove existing pay phones rather than incur the costs of relocating them at the lower height. With regard to this latter concern, the commenter misunderstood the manner in which the safe harbor and barrier removal obligations under § 36.304 will operate in the revised title III regulation for elements that comply with the 1991 Standards. The Department does not anticipate that wholesale relocation of pay telephones in existing facilities will be required under the final rule where the telephones in existing facilities already are in compliance with the 1991 Standards. If the pay phones comply with the 1991 Standards, the adoption of the 2010 Standards does not require retrofitting of these elements to reflect incremental changes in the 2010 Standards. *See* § 36.304(d)(2). However, pay telephones that were required to meet the 1991 Standards as part of new construction or alterations, but do not in fact comply with those standards, will need to be brought into compliance with the 2010 Standards as of 18

months from the publication date of this final rule. *See* § 36.406(a)(5).

The Department does not agree with the concerns expressed by the commenter about reduced revenues from pay phones mounted at lower heights. The Department believes that while given the choice some individuals may prefer to use a pay phone that is at a higher height, the availability of some phones at a lower height will not deter individuals from making needed calls.

The 2010 Standards will not require every pay phone to be installed or moved to a lowered height. The table accompanying section 217.2 of the 2010 Standards makes clear that where one or more telephones are provided on a floor, level, or an exterior site, only one phone per floor, level, or exterior site must be placed at an accessible height. Similarly, where there is one bank of phones per floor, level, or exterior site, only one phone per floor, level, or exterior site must be accessible. And if there are two or more banks of phones per floor, level, or exterior site, only one phone per bank must be placed at an accessible height.

Another comment in opposition to the lower reach range requirement was submitted on behalf of a chain of convenience stores with fuel stops. The commenter expressed the concern that the 48-inch side reach "will make it uncomfortable for the majority of the public," including persons of taller stature who would need to stoop to use equipment such as fuel dispensers mounted at the lower height. The commenter offered no objective support for the observation that a majority of the public would be rendered uncomfortable if, as required in the 2010 Standards, at least one of each type of fuel dispenser at a facility was made accessible in compliance with the lower reach range. Indeed, the Department received no comments from any individuals of tall stature expressing concern about accessible elements or equipment being mounted at the 48-inch height.

Several retail, convenience store, restaurant, and amusement park commenters expressed concern about the burden the lower side-reach requirement would place on their businesses in terms of self-service food stations and vending areas if the 48-inch requirement were applied retroactively. The cost of lowering counter height, in combination with the lack of control businesses exercise over certain prefabricated service or vending fixtures, outweighed, they argued, any benefits to persons with disabilities. For this reason, they suggested the lower side-reach requirement be referred back to the Access Board.

These commenters misunderstood the safe harbor and barrier removal obligations that will be in effect under the 2010 Standards. Those existing self-service food stations and vending areas that already are in compliance

with the 1991 Standards will not be required to satisfy the 2010 Standards unless they engage in alterations. With regard to prefabricated vending machines and food service components that will be purchased and installed in businesses after the 2010 Standards become effective, the Department expects that companies will design these machines and fixtures to comply with the 2010 Standards in the future, as many have already done in the 10 years since the 48-inch side-reach requirement has been a part of the model codes and standards used by many jurisdictions as the basis for their construction codes.

A model code organization commented that the lower side-reach requirement would create a significant burden if it required entities to lower the mounting height for light switches, environmental controls, and outlets when an alteration did not include the walls where these elements were located, such as when “an area is altered or as a path of travel obligation.” The Department believes that the final rule adequately addresses those situations about which the commenter expressed concern by not requiring the relocation of existing elements, such as light switches, environmental controls, and outlets, unless they are altered. Moreover, under § 36.403 of the 1991 rule, costs for altering the path of travel to an altered area of primary function that exceed 20 percent of the overall costs of the alteration will continue to be deemed disproportionate.

The Department has determined that the revised side-reach requirement should not be returned to the Access Board for further consideration based in large part on the views expressed by a majority of the commenters regarding the need for, and importance of, the lower side-reach requirement to ensure access for persons with disabilities.

Alterations and water closet clearances in single-user toilet rooms with in-swinging doors. The 1991 Standards allow a lavatory to be placed a minimum of 18 inches from the water closet centerline and a minimum of 36 inches from the side wall adjacent to the water closet, which precludes side transfers. The 1991 Standards do not allow an in-swinging door in a toilet or bathing room to overlap the required clear floor space at any accessible fixture. To allow greater transfer options, section 604.3.2 of the 2010 Standards prohibits lavatories from overlapping the clear floor space at water closets, except in certain residential dwelling units. Section 603.2.3 of the 2010 Standards maintains the prohibition on doors swinging into the clear floor space or clearance required for any fixture, except that they permit the doors of toilet or bathing rooms to swing into the required turning space, provided that there is sufficient clearance space for the wheelchair outside the door swing. In addition, in single-user toilet or bathing rooms, exception 2

of section 603.2.3 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is available outside the arc of the door swing.

The majority of commenters believed that this requirement would increase the number of toilet rooms accessible to individuals with disabilities who use wheelchairs or mobility scooters, and will make it easier for them to transfer. A number of commenters stated that there was no reason to return this provision to the Access Board. Numerous commenters noted that this requirement is already included in other model accessibility standards and many State and local building codes and that the adoption of the 2010 Standards is an important part of harmonization efforts.

Other commenters, mostly trade associations, opposed this requirement, arguing that the added cost to the industry outweighs any increase in accessibility. Two commenters stated that these proposed requirements would add two feet to the width of an accessible single-user toilet room; however, another commenter said the drawings in the proposed regulation demonstrated that there would be no substantial increase in the size of the toilet room. Several commenters stated that this requirement would require moving plumbing fixtures, walls, or doors at significant additional expense. Two commenters wanted the permissible overlap between the door swing and clearance around any fixture eliminated. One commenter stated that these new requirements will result in fewer alterations to toilet rooms to avoid triggering the requirement for increased clearances, and suggested that the Department specify that repairs, maintenance, or minor alterations would not trigger the need to provide increased clearances. Another commenter requested that the Department exempt existing guest room bathrooms and single-user toilet rooms that comply with the 1991 Standards from complying with the increased clearances in alterations.

After careful consideration of these comments, the Department believes that the revised clearances for single-user toilet rooms will allow safer and easier transfers for individuals with disabilities, and will enable a caregiver, aide, or other person to accompany an individual with a disability into the toilet room to provide assistance. The illustrations in Appendix B to this final rule, “Analysis and Commentary on the 2010 ADA Standards for Accessible Design,” describe several ways for public entities and public accommodations to make alterations while minimizing additional costs or loss of space. Further, in any isolated instances where existing structural limitations may entail loss of space, the public entity and public accommodation may have a technical infeasibility

defense for that alteration. The Department has, therefore, decided not to return this requirement to the Access Board.

Alterations to stairs. The 1991 Standards only require interior and exterior stairs to be accessible when they provide access to levels that are not connected by an elevator, ramp, or other accessible means of vertical access. In contrast, section 210.1 of the 2010 Standards requires all newly constructed stairs that are part of a means of egress to be accessible. However, exception 2 of section 210.1 of the 2010 Standards provides that in alterations, stairs between levels connected by an accessible route need not be accessible, except that handrails shall be provided. Most commenters were in favor of this requirement for handrails in alterations, and stated that adding handrails to stairs during alterations was not only feasible and not cost prohibitive, but also provided important safety benefits. One commenter stated that making all points of egress accessible increased the number of people who could use the stairs in an emergency. A majority of the commenters did not want this requirement returned to the Access Board for further consideration.

The International Building Code (IBC), which is a private sector model construction code, contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, thereby minimizing the impact of this provision on public entities and public accommodations. The Department believes that by requiring only the addition of handrails to altered stairs where levels are connected by an accessible route, the costs of compliance for public entities and public accommodations are minimized, while safe egress for individuals with disabilities is increased. Therefore, the Department has decided not to return this requirement to the Access Board.

Alterations to elevators. Under the 1991 Standards, if an existing elevator is altered, only that altered elevator must comply with the new construction requirements for accessible elevators to the maximum extent feasible. It is therefore possible that a bank of elevators controlled by a single call system may contain just one accessible elevator, leaving an individual with a disability with no way to call an accessible elevator and thus having to wait indefinitely until an accessible elevator happens to respond to the call system. In the 2010 Standards, when an element in one elevator is altered, section 206.6.1 will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator. Almost all commenters favored the proposed requirement. This requirement, according to these commenters, is necessary so a person with a disability need not wait until an accessible elevator responds to his or her call. One commenter

suggested that elevator owners also could comply by modifying the call system so the accessible elevator could be summoned independently. One commenter suggested that this requirement would be difficult for small businesses located in older buildings, and one commenter suggested that this requirement be sent back to the Access Board.

After considering the comments, the Department agrees that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive. The IBC contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, minimizing the impact of this provision on public entities and public accommodations. Public entities and small businesses located in older buildings need not comply with this requirement where it is technically infeasible to do so. Further, as pointed out by one commenter, modifying the call system so the accessible elevator can be summoned independently is another means of complying with this requirement in lieu of altering all other elevators programmed to respond to the same call button. Therefore, the Department has decided not to return this requirement to the Access Board.

Location of accessible routes to stages. The 1991 Standards, at section 4.33.5, require an accessible route to connect the accessible seating and the stage, as well as other ancillary spaces used by performers. The 2010 Standards, at section 206.2.6, provide in addition that where a circulation path directly connects the seating area and the stage, the accessible route must connect directly the accessible seating and the stage, and, like the 1991 Standards, an accessible route must connect the stage with the ancillary spaces used by performers.

In the NPRM, the Department asked operators of auditoria about the extent to which auditoria already provide direct access to stages and whether there were planned alterations over the next 15 years that included accessible direct routes to stages. The Department also asked how to quantify the benefits of this requirement for persons with disabilities, and invited commenters to provide illustrative anecdotal experiences about the requirement's benefits.

The Department received many comments regarding the costs and benefits of this requirement. Although little detail was provided, many industry and governmental entity commenters anticipated that the costs of this requirement would be great and that it would be difficult to implement. They noted that premium seats may have to be removed and that load-bearing walls may have to be relocated. These commenters suggested that the significant costs would deter alterations to the stage area for a great many auditoria. Some commenters suggested that ramps to

the front of the stage may interfere with means of egress and emergency exits. Several commenters requested that the requirement apply to new construction only, and one industry commenter requested an exemption for stages used in arenas or amusement parks where there is no audience participation or where the stage is a work area for performers only. One commenter requested that the requirement not apply to temporary stages.

The final rule does not require a direct accessible route to be constructed where a direct circulation path from the seating area to the stage does not exist. Consequently, those commenters who expressed concern about the burden imposed by the revised requirement (*i.e.*, where the stage is constructed with no direct circulation path connecting the general seating and performing area) should note that the final rule will not require the provision of a direct accessible route under these circumstances. The final rule applies to permanent stages, as well as “temporary stages,” if there is a direct circulation path from the seating area to the stage. However, the Department recognizes that in some circumstances, such as an alteration to a primary function area, the ability to provide a direct accessible route to a stage may be costly or technically infeasible, and the auditorium owner is not precluded by the revised requirement from asserting defenses available under the regulation. In addition, the Department notes that since section 4.33.5 of the 1991 Standards requires an accessible route to a stage, the safe harbor will apply to existing facilities whose stages comply with the 1991 Standards.

Several governmental entities supported accessible auditoria and the revised requirement. One governmental entity noted that its State building code already required direct access, that it was possible to provide direct access, and that creative solutions had been found to do so.

Many advocacy groups and individual commenters strongly supported the revised requirement, discussing the acute need for direct access to stages, as such access has an impact on a great number of people at important life events, such as graduations and awards ceremonies, at collegiate and competitive performances and other school events, and at entertainment events that include audience participation. Many commenters expressed the belief that direct access is essential for integration mandates to be satisfied, and that separate routes are stigmatizing and unequal. The Department agrees with these concerns.

Commenters described the impact felt by persons in wheelchairs who are unable to access the stage at all when others are able to do so. Some of these commenters also discussed the need for the performers and production staff who use wheelchairs to have di-

rect access to the stage, and they provided a number of examples that illustrated the importance of the rule proposed in the NPRM. Personal anecdotes were provided in comments and at the Department’s public hearing on the NPRM. One mother spoke passionately and eloquently about the unequal treatment experienced by her daughter, who uses a wheelchair, at awards ceremonies and band concerts. Her daughter was embarrassed and ashamed to be carried by her father onto a stage at one band concert. When the venue had to be changed for another concert to an accessible auditorium, the band director made sure to comment that he was unhappy with the switch. Rather than endure the embarrassment and indignities, her child dropped out of band the following year.

Another father commented about how he was unable to speak from the stage at a PTA meeting at his child’s school. Speaking from the floor limited his line of sight and his participation. Several examples were provided of children who could not participate on stage during graduation, awards programs, or special school events, such as plays and festivities. One student did not attend his college graduation because he would not be able to get on stage. Another student was unable to participate in the class Christmas programs or end-of-year parties unless her father could attend and lift her onto the stage. These commenters did not provide a method to quantify the benefits that would accrue by having direct access to stages. One commenter stated, however, that “the cost of dignity and respect is without measure.”

Many industry commenters and governmental entities suggested that the requirement be sent back to the Access Board for further consideration. One industry commenter mistakenly noted that some international building codes do not incorporate the requirement and that, therefore, there is a need for further consideration. However, the Department notes that both the 2003 and 2006 editions of the IBC include scoping provisions that are almost identical to this requirement and that these editions of the model code are the most frequently used. Many individuals and advocacy group commenters requested that the requirement be adopted without further delay. These commenters spoke of the acute need for direct access to stages and the amount of time it would take to resubmit the requirement to the Access Board. Several commenters noted that the 2004 ADAAG tracks recent model codes, and that there is thus no need for further consideration. The Department agrees that no further delay is necessary and therefore has decided it will not return the requirement to the Access Board for further consideration.

Assistive listening systems. The 1991 Standards at sections 4.33.6 and 4.33.7 require assistive listening systems (ALS) in assembly

areas and prescribe general performance standards for ALS systems. In the NPRM, the Department proposed adopting the technical specifications in the 2004 ADAAG for ALS that are intended to ensure better quality and effective delivery of sound and information for persons with hearing impairments, especially those using hearing aids. The Department noted in the NPRM that since 1991, advancements in ALS and the advent of digital technology have made these systems more amenable to uniform standards, which, among other things, should ensure that a certain percentage of required ALS systems are hearing-aid compatible. 73 FR 34508, 34513 (June 17, 2008). The 2010 Standards at section 219 provide scoping requirements and at section 706 address receiver jacks, hearing aid compatibility, sound pressure level, signal-to-noise ratio, and peak clipping level. The Department requested comments specifically from arena and assembly area administrators on the cost and maintenance issues associated with ALS, and asked generally about the costs and benefits of ALS, and asked whether, based upon the expected costs of ALS, the issue should be returned to the Access Board for further consideration.

Commenters from advocacy organizations noted that persons who develop significant hearing loss often discontinue their normal routines and activities, including meetings, entertainment, and large group events, due to a sense of isolation caused by the hearing loss or embarrassment. Individuals with longstanding hearing loss may never have participated in group activities for many of the same reasons. Requiring ALS may allow individuals with disabilities to contribute to the community by joining in government and public events, and through increased economic activity associated with community activities and entertainment. Making public events and entertainment accessible to persons with hearing loss also brings families and other groups that include persons with hearing loss into more community events and activities, thus exponentially increasing the benefit from ALS.

Many commenters noted that when a person has significant hearing loss, that person may be able to hear and understand information in a quiet situation with the use of hearing aids or cochlear implants; however, as background noise increases and the distance between the source of the sound and the listener grows, and especially where there is distortion in the sound, an ALS becomes essential for basic comprehension and understanding. Commenters noted that among the 31 million Americans with hearing loss, and with a projected increase to over 78 million Americans with hearing loss by 2030, the benefit from ALS is huge and growing. Advocates for persons with disabilities and individuals commented that they

appreciated the improvements in the 2004 ADAAG standards for ALS, including specifications for the ALS systems and performance standards. They noted that providing neckloops that translate the signal from the ALS transmitter to a frequency that can be heard on a hearing aid or cochlear implant are much more effective than separate ALS system headsets, which sometimes create feedback, often malfunction, and may create distractions for others seated nearby. Comments from advocates and users of ALS systems consistently noted that the Department's regulation should, at a minimum, be consistent with the 2004 ADAAG. Although there were requests for adjustments in the scoping requirements from advocates seeking increased scoping requirements, and from large venue operators seeking fewer requirements, there was no significant concern expressed by commenters about the technical specifications for ALS in the 2004 ADAAG.

Some commenters from trade associations and large venue owners criticized the scoping requirements as too onerous, and one commenter asked for a remand to the Access Board for new scoping rules. However, one State agency commented that the 2004 ADAAG largely duplicates the requirements in the 2006 IBC and the 2003 ANSI codes, which means that entities that comply with those standards would not incur additional costs associated with ADA compliance.

According to one State office of the courts, the costs to install either an infrared system or an FM system at average-sized facilities, including most courtrooms covered by title II, would be between \$500 and \$2,000, which the agency viewed as a small price in comparison to the benefits of inclusion. Advocacy organizations estimated wholesale costs of ALS systems at about \$250 each, and individual neckloops to link the signal from the ALS transmitter to hearing aids or cochlear implants at less than \$50 per unit. Many commenters pointed out that if a facility already is using induction neckloops, it would already be in compliance already and would not have any additional installation costs. One major city commented that annual maintenance is about \$2,000 for the entire system of performance venues in the city. A trade association representing very large venues estimated annual maintenance and upkeep expenses, including labor and replacement parts, to be at most about \$25,000 for a very large professional sports stadium.

One commenter suggested that the scoping requirements for ALS in the 2004 ADAAG were too stringent and that the Department should refer them back to the Access Board for further review and consideration. Others commented that the requirement for new ALS systems should mandate multichannel receivers capable of receiving audio description for persons who are blind, in addition to

a channel for amplification for persons who are hard of hearing. Some commenters suggested that the Department should require a set schedule and protocol of mandatory maintenance. Department regulations already require maintenance of accessible features at §36.211(a) of the title III regulation, which obligates a title III entity to maintain ALS in good working order. The Department recognizes that maintenance of ALS is key to its usability. Necessary maintenance will vary dramatically from venue to venue based upon a variety of factors including frequency of use, number of units, quality of equipment, and other items. Accordingly, the Department has determined that it is not appropriate to mandate details of maintenance, but notes that failure to maintain ALS would violate §36.211(a) of this rule.

The NPRM asked whether the Department should return the issue of ALS requirements to the Access Board for further review. The Department has received substantial feedback on the technical and scoping requirements for ALS and is convinced that these requirements are reasonable—especially in light of the fact that the requirements largely duplicate those in the 2006 IBC and the 2003 ANSI codes already adopted in many States—and that the benefits justify the requirements. In addition, the Department believes that the new specifications will make ALS work more effectively for more persons with disabilities, which, together with a growing population of new users, will increase demand for ALS, thus mooted criticism from some large venue operators about insufficient demand. Thus, the Department has determined that it is unnecessary to refer this issue back to the Access Board for reconsideration.

Accessible teeing grounds, putting greens, and weather shelters. The Department's NPRM sought public input on the proposed requirements for accessible golf courses. These requirements specifically relate to accessible routes within the boundaries of the courses, as well as the accessibility of golfing elements (*e.g.*, teeing grounds, putting greens, weather shelters).

In the NPRM, the Department sought information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages, and, if so, whether they intended to avail themselves of the proposed accessible route exception for golf car passages. 73 FR 34508, 34513 (June 17, 2008).

Most commenters expressed support for the adoption of an accessible route requirement that includes an exception permitting golf car passage as all or part of an accessible route. Comments in favor of the proposed standard came from golf course owners and operators, individuals, organizations, and disability rights groups, while comments opposing adoption of the golf course require-

ments generally came from golf courses and organizations representing the golf course industry.

The majority of commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit golf cars to drive on the course where paths are not present—and thus meet the accessible route requirement. Several commenters disagreed with the assumption in the Initial RIA that virtually every tee and putting green on an existing course would need to be regraded in order to provide compliant accessible routes. According to one commenter, many golf courses are relatively flat with little slope, especially those heavily used by recreational golfers. This commenter concurred with the Department that it is likely that most existing golf courses have a golf car passage to tees and greens, thereby substantially minimizing the cost of bringing an existing golf course into compliance with the proposed standards. One commenter reported that golf course access audits found that the vast majority of public golf courses would have little difficulty in meeting the proposed golf course requirements. In the view of some commenters, providing access to golf courses would increase golf participation by individuals with disabilities.

The Department also received many comments requesting clarification of the term “golf car passage.” For example, one commenter requesting clarification of the term “golf car passage” argued that golf courses typically do not provide golf car paths or pedestrian paths onto the actual teeing grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

After careful consideration of the comments, the Department has decided to adopt the 2010 Standards specific to golf facilities. The Department believes that in order for individuals with mobility disabilities to have an opportunity to play golf that is equal to golfers without disabilities, it is essential that golf courses provide an accessible route or accessible golf car passage to connect accessible elements and spaces within the boundary of the golf course, including teeing grounds, putting greens, and weather shelters.

Public Comments on Other NPRM Issues

Equipment and furniture. Equipment and furniture are covered under the Department's ADA regulations, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal. See 28 CFR 36.302,

36.304. The Department has not issued specific regulatory guidance on equipment and furniture, but proposed such regulations in 1991. The Department decided not to establish specific equipment requirements at that time because the requirements could be addressed under other sections of the regulation and because there were no appropriate accessibility standards applicable to many types of equipment at that time. *See* 28 CFR part 36, app. B (2009) (“Proposed Section 36.309 Purchase of Furniture and Equipment”).

In the NPRM, the Department announced its intention not to regulate equipment, proposing instead to continue with the current approach. The Department received numerous comments objecting to this decision and urging the Department to issue equipment and furniture regulations. Based on these comments, the Department has decided that it needs to revisit the issuance of equipment and furniture regulations, and it intends to do so in future rulemaking.

Among the commenters’ key concerns, many from the disability community objected to the Department’s earlier decision not to issue equipment regulations, especially for medical equipment. These groups recommended that the Department list by name certain types of medical equipment that must be accessible, including exam tables (that lower to 15 inches above the floor or lower), scales, medical and dental chairs, and radiologic equipment (including mammography equipment). These commenters emphasized that the provision of medically-related equipment and furniture also should be specifically regulated since they are not included in the 2004 ADAAG (while depositors, change machines, fuel dispensers, and ATMs are) and because of their crucial role in the provision of healthcare. Commenters described how the lack of accessible medical equipment negatively affects the health of individuals with disabilities. For example, some individuals with mobility disabilities do not get thorough medical care because their health providers do not have accessible examination tables or scales.

Commenters also said that the Department’s stated plan to assess the financial impact of free-standing equipment on businesses was not necessary, as any regulations could include a financial-balancing test. Other commenters representing persons who are blind or have low vision urged the Department to mandate accessibility for a wide range of equipment—including household appliances (stoves, washers, microwaves, and coffee makers), audiovisual equipment (stereos and DVD players), exercise machines, vending equipment, ATMs, computers at Internet cafes or hotel business centers, reservations kiosks at hotels, and point-of-sale devices—through speech output and tactile labels and controls. They argued

that modern technology allows such equipment to be made accessible at minimal cost. According to these commenters, the lack of such accessibility in point-of-sale devices is particularly problematic because it forces blind individuals to provide personal or sensitive information (such as personal identification numbers) to third parties, which exposes them to identity fraud. Because the ADA does not apply directly to the manufacture of products, the Department lacks the authority to issue design requirements for equipment designed exclusively for use in private homes. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, III-4.4200, available at <http://www.ada.gov/taman3.html>. To the extent that equipment intended for such use is used by a covered entity to facilitate a covered service or activity, that covered entity must make the equipment accessible to the extent that it can. *See id.*: 28 CFR part 36, app. B (2009) (“Proposed Section 36.309 Purchase of Furniture and Equipment”).

Some commenters urged the Department to require swimming pool operators to provide aquatic wheelchairs for the use of persons with disabilities when the swimming pool has a sloped entry. If there is a sloped entry, a person who uses a wheelchair would require a wheelchair designed for use in the water in order to gain access to the pool since taking a personal wheelchair into water would rust and corrode the metal on the chair and damage any electrical components of a power wheelchair. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs or other mobility aids.

Additionally, many commenters urged the Department to regulate the height of beds in accessible hotel guest rooms and to ensure that such beds have clearance at the floor to accommodate a mechanical lift. These commenters noted that in recent years, hotel beds have become higher as hotels use thicker mattresses, thereby making it difficult or impossible for many individuals who use wheelchairs to transfer onto hotel beds. In addition, many hotel beds use a solid-sided platform base with no clearance at the floor, which prevents the use of a portable lift to transfer an individual onto the bed. Consequently, individuals who bring their own lift to transfer onto the bed cannot independently get themselves onto the bed. Some commenters suggested various design options that might avoid these situations.

The Department intends to provide specific guidance relating to both hotel beds and aquatic wheelchairs in a future rulemaking. For the present, the Department reminds

covered entities that they have the obligation to undertake reasonable modifications to their current policies and procedures and to undertake barrier removal or provide alternatives to barrier removal to make their facilities accessible to persons with disabilities. In many cases, providing aquatic wheelchairs or adjusting hotel bed heights may be necessary to comply with those requirements.

Commenters from the business community objected to the lack of clarity from the NPRM as to which equipment must be accessible and how to make it accessible. Several commenters urged the Department to clarify that equipment located in a public accommodation need not meet the technical specifications of ADAAG so long as the service provided by the equipment can be provided by alternative means, such as an employee. For example, the commenters suggested that a self-service check-in kiosk in a hotel need not comply with the reach range requirement so long as a guest can check in at the front desk nearby. Several commenters argued that the Department should not require that point-of-sale devices be accessible to individuals who are blind or have low vision (although complying with accessible route and reach range was acceptable), especially until the Department adopts specific standards governing such access.

The Department has decided not to add specific scoping or technical requirements for equipment and furniture in this final rule. Other provisions of the regulation, including those requiring reasonable modifications of policies, practices, or procedures, readily achievable barrier removal, and effective communication will require the provision of accessible equipment in appropriate circumstances. Because it is clear that many commenters want the Department to provide additional specific requirements for accessible equipment, the Department plans to initiate a rulemaking to address these issues in the near future.

Accessible golf cars. An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand-operated brake and accelerator, carries golf clubs in an accessible location, and has a seat that both swivels and raises to put the golfer in a standing or semi-standing position. The 1991 regulation contained no language specifically referencing accessible golf cars. After considering the comments addressing the ANPRM's proposed requirement that golf courses make at least one specialized golf car available for the use of individuals with disabilities, and the safety of accessible golf cars and their use on golf course greens, the Department stated in the NPRM that it would not issue regulations specific to golf cars.

The Department received many comments in response to its decision to propose no new regulation specific to accessible golf cars. The majority of commenters urged the Department to require golf courses to provide accessible golf cars. These comments came from individuals, disability advocacy and recreation groups, a manufacturer of accessible golf cars, and representatives of local government. Comments supporting the Department's decision not to propose a new regulation came from golf course owners, associations, and individuals.

Many commenters argued that while the existing title III regulation covered the issue, the Department should nonetheless adopt specific regulatory language requiring golf courses to provide accessible golf cars. Some commenters noted that many local governments and park authorities that operate public golf courses have already provided accessible golf cars. Experience indicates that such golf cars may be used without damaging courses. Some argued that having accessible golf cars would increase golf course revenue by enabling more golfers with disabilities to play the game. Several commenters requested that the Department adopt a regulation specifically requiring each golf course to provide one or more accessible golf cars. Other commenters recommended allowing golf courses to make "pooling" arrangements to meet demands for such cars. A few commenters expressed support for using accessible golf cars to accommodate golfers with and without disabilities. Commenters also pointed out that the Departments of the Interior and Defense have already mandated that golf courses under their jurisdictional control must make accessible golf cars available unless it can be demonstrated that doing so would change the fundamental nature of the game.

While an industry association argued that at least two models of accessible golf cars meet the specifications recognized in the field, and that accessible golf cars cause no more damage to greens or other parts of golf courses than players standing or walking across the course, other commenters expressed concerns about the potential for damage associated with the use of accessible golf cars. Citing safety concerns, golf organizations recommended that an industry safety standard be developed.

Although the Department declines to add specific scoping or technical requirements for golf cars to this final rule, the Department expects to address requirements for accessible golf cars in future rulemaking. In the meantime, the Department believes that golfers with disabilities who need accessible golf cars are protected by other existing provisions in the title III regulation, including those requiring reasonable modifications of policies, practices, or procedures, and readily achievable barrier removal.

Web site accessibility. Many commenters expressed disappointment that the NPRM did not specifically require title III-covered entities to make their Web sites, through which they offer goods and services, accessible to individuals with disabilities. Commenters urged the Department to require specifically that entities that provide goods or services on the Internet make their Web sites accessible, regardless of whether or not these entities also have a “bricks and mortar” location. The commenters explained that such clarification was needed because of the current ambiguity caused by court decisions as to whether web-only businesses are covered under title III. Commenters argued that the cost of making Web sites accessible through Web site design is minimal, yet critical, to enabling individuals with disabilities to benefit from the goods and services an entity offers through its Web site. The Internet has become an essential tool for many Americans and, when accessible, provides individuals with disabilities great independence. Commenters recommended that, at a minimum, the Department require covered entities to meet the Electronic and Information Technology Accessibility Standards issued pursuant to section 508. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR Part 1194.

The Department agrees that the ability to access the goods and services offered on the Internet through the Web sites of public accommodations is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most of the public. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In light of the growing importance of eBcommerce, ensuring nondiscriminatory access to the goods and services offered through the Web sites of covered entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. See *Accessibility of State and Local Government Websites to People with Disabilities* (June 2003), available at www.ada.gov/websites2.htm. As the Department stated in that publication, an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line. However, such an alternative must provide an

equal degree of access in terms of hours of operation and range of options and programs available. For example, if retail goods or bank services are posted on an inaccessible Web site that is available 24 hours a day, 7 days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), available at <http://www.w3.org/TR/WAI-WEBCONTENT> (last visited June 24, 2010), which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department did not issue proposed regulations as part of its NPRM, and thus is unable to issue specific regulatory language on Web site accessibility at this time. However, the Department expects to engage in rulemaking relating to Web site accessibility under the ADA in the near future.

Multiple chemical sensitivities. The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

[AG Order No. 3181–2010, 75 FR 56258, Sept. 15, 2010; 76 FR 13287, Mar. 11, 2011]

APPENDIX B TO PART 36—ANALYSIS AND COMMENTARY ON THE 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN

APPENDIX B TO PART 36

Analysis and Commentary on the 2010 ADA Standards for Accessible Design

The following is a discussion of substantive changes in the scoping and technical requirements for new construction and alterations